TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 347

MAX JABEN, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1964
CERTIORARI GRANTED OCTOBER 19, 1964

SUPREME COURT OF THE UNITED STATES

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No. 347

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[fol. A]

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

No. 21547

UNITED STATES OF AMERICA,

—against—

MAX JABEN.

COMPLAINT FOR VIOLATION OF SECTION 7201 INTERNAL REVENUE CODE OF 1954—Filed April 15, 1963

Before Lee E. Cisel, United States Commissioner, Western District of Missouri.

The undersigned complainant, being duly sworn, states: That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, in the Western District of Missouri, Max Jaben did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, [fol. B] and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income

for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

David A. Thompson, Special Agent, Internal Revenue Service, Kansas City, Missouri.

Sworn to before me and subscribed in my presence, this 15th day of April, 1963.

Lee E. Cisel, United States Commissioner.

(Seal)

[fol. C]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

Commissioner's Docket No. 27

Case No. 229

UNITED STATES OF AMERICA,

v.

MAX JABEN.

SUMMONS

To Max Jaben

You are hereby summoned to appear before the undersigned United States Commissioner Kansas City, Missouri, at 517 U. S. Court House on May 15, 1963, at 10 o'clock A.M. to answer to a complaint charging you with wilfully attempting to evade and defeat the income taxes due and owing by you to the United States of America for the calendar year 1956 in violation of U.S.C. Title 26 Section 7201.

Lee E. Cisel, United States Commissioner

Date April 15, 1963

This summons was received by me at on 19

Max Jaben, Defendant.

RETURN*

This summons was served by me on April 15, 1963, in the following manner:

By handing and leaving a true Copy of Summons and Complaint with Max Jaben at the Federal Courthouse Room 509 K.C. Mo. at 3:30 PM on this the 15th Day of April 1963.

Francis M. Wilson, U. S. Marshal, By Francis R. Wallis, DUSM.

		3.00
END Wallis 4-15-1963	56 Mi.	$6.72
		9.72

[fol. D] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

No. 21547

UNITED STATES OF AMERICA, Plaintiff,

vs.

MAX JABEN, Defendant.

INDICTMENT—May 17, 1963

THE GRAND JURY CHARGES:

Count I

That on or about the 16th day of April, 1957, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, did wilfully and knowingly attempt

---

* As to who may serve the summons and the manner of its service see Rule 4 (c) of the Federal Rules of Criminal Procedure and Rule 4 (c) of the Rules of Civil Procedure.

to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $17,665.31 and that the amount of tax due and owing thereon was the sum of $6,017.82, whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $40,001.76, upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

Count II

That on or about the 15th day of April, 1958, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, did wilfully and knowingly make and [fol. E] subscribe and file and cause to be filed with the District Director of Internal Revenue for the Internal Revenue Collection District of Kansas City, Missouri, at Kansas City, Missouri, a Form 1040 United States Individual Income Tax Return for the calendar year 1957, which was verified by a written declaration that it was made under the penalties of perjury, which said Form 1040 United States Individual Income Tax Return for the calendar year 1957 he did not believe to be true and correct as to every material matter in that in the said Form 1040 United States Individual Income Tax Return for the calendar year 1957 he stated that his taxable income for the calendar year 1957 was the sum of $22,370.02 and that the amount of tax due and owing thereon was the sum of $7,364.60, whereas, as he then and there well knew and believed he had during calendar year 1957 received taxable income of $25,466.47 upon which said taxable income he owed to the United States of America an income tax of $7,430.58.

In violation of Section 7206(1), Internal Revenue Code; 26 U.S.C., Section 7206(1).

Count III

That on or about the 13th day of July, 1959, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, who during the calendar year 1958 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1958, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $14,020.13 and that the amount of tax due and owing thereon was the sum of $3,383.64, whereas, as he then and [fol. F] there well knew, their joint taxable income for the said calendar year was the sum of $24,039.46, upon which said taxable income there was owing to the United States of America an income tax of $6,816.97.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A True Bill

George H. Flamank, Foreman.

K. William O'Connor, Special Atty., Dept. of Justice,
James J. Featherstone, Special Attorney, Dept. of Justice,
F. Russell Millin, U. S. Attorney.

(See Opposite)

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

UNITED STATES COMMISSIONER
WESTERN DISTRICT OF MISSOURI

BEFORE LEE E. CISEL (Name of commissioner) — KANSAS CITY, MISSOURI (Address)

COMMISSIONER'S DOCKET NO. 27 CASE NO. 229
THE UNITED STATES
vs.
MAX JABEN

Complaint filed on Apr. 15, 1963, by David A. Thompson
Official title SA IRS, charging violation of United States Code, Title 26, Section 7201, on Apr. 16 19 57, at Kansas City, Mo in the division of the Western district of Missouri as follows: did file a fraudlent income tax return with intent to evade and defeat income taxes due and owing by him to the U.S.

(Here insert brief summary of facts constituting offense charged)

WARRANTS OR SUMMONS ISSUED:
Date Apr. 15, 1963 ~~Warrant~~/Summons for Defendant (Name of defendant)
to (name and title of officer)
Substance of return Summons served on the defendant in Kansas City, Missouri on Apr. 15, 1963 by Francis R. Wallis, Deputy U.S. Marshal
Date Warrant/Summons for (Name of defendant)
to (name and title of officer)
Substance of return

FILED
JUN 13 1963
J. C. TRUMAN, CLERK
BY DEPUTY CLERK

PROCEEDINGS ON FIRST PRESENTATION OF ACCUSED TO COMMISSIONER:
Date Arrested by on warrant of (Name of issuing officer) without warrant.
Appearances: for United States (Name) (Address)
for accused (Name) (Address)
Proceedings taken
(Here insert with dates, when appropriate, a seriatim account of essential steps taken at hearing such as "complaint prepared,"
if arrest is without warrant: "defendant informed of complaint and right to retain counsel and preliminary hearing": "preliminary examination waived,"
if that is the fact; any adjournments taken, etc.

NO FURTHER PROCEEDINGS: At request of F. Russell Millin, U.S. Attorney, a transcript of all proceedings before your commissioner without a preliminary hearing or dismissal of the complaint is filed in the office of the Clerk of this Court.

[fol. 6]

Date Filed ..... (Name of commissioner) ..... (Address)

COMMISSIONER'S
DOCKET No. 27 CASE No. 229
THE UNITED STATES
vs.
MAX JABEN

Complaint filed on Apr. 15, 1963, by David A. Thompson
Official title SA IRS, charging violation of United States Code, Title 26, Section 7201, on Apr. 16 1957, at Kansas City, Mo in the division of the Western district of Missouri as follows: did file a fraudlent income tax return with intent to evade and defeat income taxes due and owing by him to the U.S.

(Here insert brief summary of facts constituting offense charged)

WARRANTS OR SUMMONS ISSUED:
Date Apr. 15, 1963 Warrant/Summons for Defendant (Name of defendant)
to (name and title of officer) .....
Substance of return Summons served on the defendant in Kansas City, Missouri on Apr. 15, 1963 by Francis R. Wallis, Deputy U.S. Marshal
Date ..... Warrant/Summons for ..... (Name of defendant)
to (name and title of officer) .....
Substance of return .....

FILED
JAN 13 1963
J. C. TRUMAN, CLERK
BY ..... DEPUTY CLERK

PROCEEDINGS ON FIRST PRESENTATION OF ACCUSED TO COMMISSIONER:
Date ..... Arrested by ..... on warrant of ..... (Name of issuing officer) without warrant.
Appearances { for United States ..... (Name) (Address)
for accused ..... (Name) (Address)
Proceedings taken .....
(Here insert with dates, when appropriate, a seriatim account of essential steps taken at hearing such as "complaint prepared."
If arrest is without warrant: "defendant informed of complaint and right to retain counsel and preliminary hearing": "preliminary examination waived."
If that is the fact; any adjournments taken, etc.
NO FURTHER PROCEEDINGS: At request of F. Russell Millin, U.S. Attorney, a transcript of all proceedings before your commissioner without a preliminary hearing or dismissal of the complaint is filed in the office of the Clerk of this Court.

Outcome .....

Bail fixed ....., 19..... Amount, $..... Bonded ....., 19....., by cash deposited by (name) ..... Address ..... transmitted to clerk of district court ....., 19..... [or] by surety (name) ..... Address ..... (name) ..... Address ....., who justified by affidavit dated ....., 19....., [or] committed to ..... on ....., 19.....

[fol. 6]

SUBPOENAS FOR WITNESSES ISSUED:

....., 19....., for (name of tness).....

at request of (name of party).....

Substance of return.....

.....

....., 19....., for (name of witness).....

at request of (name of party).....

Substance of return.....

.....

....., 19....., for (name of witness).....

at request of (name of party).....

Substance of return.....

.....

PRELIMINARY EXAMINATION:

(Not to be used if case was disposed of at first presentation)

Date..... Appearances for { United States (Name) ..... (Address) ..... Accused (Name) ..... (Address) .....

WITNESSES FOR UNITED STATES: (List names and addresses)

....., ...

....., ...

....., ...

....., ...

WITNESSES FOR ACCUSED: (List names and addresses)

....., ...

....., ...

....., ...

....., ...

Witness payroll containing..... names certified to United States Marshal for payment....., 19.....

Proceedings taken.....

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Outcome.....

Bail fixed....., 19..... Amount, $..... Bonded....., 19....., by cash deposited by (name)..... Address.....

transmitted to clerk of district court....., 19.....

[or] by surety (names)..... Address.....

and..... Address.....

who justified by affidavit....., 19..... Committed to.....

on....., 19.....

Certified to be a correct transcript.

Made this 13th day of June, 19 63

.....

....., 19....., for (name of tness).....
at request of (name of party).....
Substance of return.....

....., 19....., for (name of witness).....
at request of (name of party).....
Substance of return.....

....., 19....., for (name of witness).....
at request of (name of party).....
Substance of return.....

PRELIMINARY EXAMINATION:
(Not to be used if case was disposed of at first presentation)

Date..... Appearances for { United States (Name) ..... (Address) ..... / Accused (Name) ..... (Address) ..... }

WITNESSES FOR UNITED STATES: (List names and addresses)

....., ...
....., ...
....., ...
....., ...

WITNESSES FOR ACCUSED: (List names and addresses)

....., ...
....., ...
....., ...
....., ...

Witness payroll containing.....names certified to United States Marshal for payment....., 19.....
Proceedings taken.....

Outcome.....
Bail fixed....., 19..... Amount, $..... Bonded....., 19....., by cash
deposited by (name)..... Address.....
transmitted to clerk of district court....., 19.....
[or] by surety (names)..... Address.....
and..... Address.....
who justified by affidavit....., 19..... Committed to.....
on....., 19.....
Certified to be a correct transcript.
Made this 13th day of June, 19 63
Transmitted to Clerk of United States District Court for the Western
district of Missouri, June 13, 19 63

.....
United States Commissioner.

[fol. 1]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

No. 21547-3

UNITED STATES OF AMERICA, Plaintiff,

vs.

MAX JABEN, Defendant.

Excerpts From Transcript of Oral Argument on All Motions Now Pending—August 6, 1963

Be It Remembered, that on Tuesday, August 6, 1963, the above entitled cause came on for oral argument on Defendants' Motion to Dismiss, Motion for a Bill of Particulars, Motion for Production of Documentary Evidence and Objections under Rule 17(c), Motion for Discovery and Inspection under Rule 16, and Motion to Suppress Evidence; also Motion of F. Russell Millin, United States Attorney, to Quash the Subpoena of the Defendant dated August 2, 1963; Motion of David A. Thompson, Special Agent, Internal Revenue Service, to Quash the Subpoena of the Defendant Dated August 2, 1963, before the Honorable Richard M. Duncan, Judge, at the Court House in Kansas City, Missouri.

APPEARANCES:

The Plaintiff was represented by Hon. F. Russell Millin, United States Attorney, Kansas City, Missouri, and Hon. [fol. 2] Donald A. Hansen, Trial Attorney, Department of Justice, Washington, D. C.

The Defendant was represented by Mr. Morris Shenker and Mr. E. Shapiro, Attorneys at Law, 408 Olive Street, St. Louis, Missouri; Mr. James P. Quinn and Mr. Kenneth Cohn, Attorneys at Law, Kansas City, Missouri.

Whereupon, the following proceedings were had and entered of record:

The Court: All right, gentlemen, proceed whenever you are ready. Whatever you want to take up first is all right with me.

Mr. Shenker: May it please your Honor, with reference to the motions that we have set for hearing this morning, some of the motions require the taking of testimony, and I thought in the interest of orderly procedure, that we might proceed with the Motion to Dismiss first, and then going from there to the other motions.

The Court: I think that would be the best way to handle it.

Mr. Millin: All right.

DEFENDANT'S CASE

Whereupon, the defendant, to sustain the issues in his behalf, offered the following testimony, among others, oral and documentary, and made the following admissions, to-wit:

[fol. 3] LEE E. CISEL being produced, sworn and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Shenker:

Q. Will you please state your name?

A. My name is Lee E. Cisel.

Q. Your occupation?

A. I am the United States Commissioner in the Western District of Missouri at Kansas City.

Q. And you were so engaged and so occupied the same position on April the 15th, 1963?

A. I did.

Q. Judge, I will ask you if on that date you had occasion to issue a complaint with reference to the defendant, Max Jaben?

A. Did you say 16th or 15th?

Q. Beg pardon?

A. Did you say the 16th or 15th? The complaint was filed before me. I didn't issue the complaint on that date.

Q. You issued the summons?

A. I issued a summons on that date, yes.

Q. Was that on the 15th?

A. The 15th day of April, 1963.

Q. Do you have your record with you pertaining to this matter?

[fol. 4] A. I have some record, I brought all my record, but some of my records are in the District Clerk's office.

Q. You brought all those that you have?

A. All that I have, yes.

Q. And may we see those, please?

A. Yes, sir.

Q. Is it permissible to have this page marked?

A. Yes, I will take it out for you.

(Defendant's Motion Exhibit 1, marked for identification.)

By Mr. Shenker:

Q. Judge, I have this which has been marked as Defendant's Motion Exhibit No. 1, and ask you to look at it and state what it is?

A. This is the original of my transcript in the proceeding based on a complaint against the defendant named Max Jaben. On the other side only appears my signature and the date this was made and the date that it was transmitted to the Clerk of the United States District Court.

Q. Now, does this one sheet on both sides constitute the entire record of the proceeding of your record that was made at the time the complaint was filed?

A. I would assume not, because I am under duty to send a copy of what I do daily to the United States Attorney's office, and a copy of it to the Marshal's office; and, Mr. Quinn there has the blue copies.

[fol. 5] Q. Very well.

(Defendant's Motion Exhibit 2 marked for identification.)

By Mr. Shenker:

Q. I show you what has been marked as Defendant's Motion Exhibit 2, and ask you if that is also a part of your records?

A. It is.

Q. Of what you did in this matter?

A. That is right.

Q. This Exhibit 2 consists of six pages, is that correct?

A. Well, now, of course, there is only four of the blue sheets that I mentioned as being my report to the United States Attorney. Now, the other two are something else.

Q. They do not relate to your record?

A. They might relate to my record, but we were speaking about my reports to the United States Attorney and the United States Marshal made daily.

Q. I will show you now Defendant's Motion Exhibit 2, and ask you to state how many pages it consists of and what they are?

A. There are four pages looking at the last page which was first in point of time. It shows the issuance of a summons on the 15th day of April, 1963, upon complaint made by David A. Thompson, Special Agent, in the Internal Revenue Service based on Section 7201 Internal Revenue [fol. 6] Code, and this means I handed it to the officers, that is, the United States Marshal a copy, which would be a yellow copy and a white copy, which would be the original to the United States Attorney on that date.

Q. You mean that notation, 4-15?

A. That means the day I handed it in. This is the day it occurred. It happens to be the same day.

Q. And the other pages what do they show?

A. This other page is dated May 11, 1963, it is also handed in on the same day, recites the hearing is continued to May 22, 1963 at 2:00 p. m. at the request of the Government.

Q. The next?

A. On the next page dated 5-22, 1963, and I omitted to put the date down here as I customarily do when it was handed in, the preliminary hearing was continued to the 29th day of May, 1963, at 2:00 p. m. and there is a question that I asked, what disposition should be made.

Q. I see, that is a question that you do ask in sending this document to the United States Attorney?

A. This is directed to the United States Attorney, this question.

Q. All right. Now, the other page?

A. The other page is dated June the 10th, 1963, and handed in June the 10th, 1963, and it also says, what dis-[fol. 7] position, and then it has here the communication from Mr. Millin as to what he wanted me to do.

Q. What was the communication?

A. That he wanted no further proceeding in it. Did not want it dismissed and asked that the transcript be sent to the Clerk's office, and I have 6-13-63, I think that is the date the transcript was sent to the Clerk's office.

Q. Now, this page here, is this also a part of your records?

A. Yes, it is.

Q. Now, when the United States Attorney asked you to send that transcript to the Clerk's office, were you talking then about a transcript which is contained in Exhibit 1?

A. That is it and here is the rest.

Q. And it has the recitation here, what it says, "At request of F. Russell Millin, U. S. Attorney, a transcript of all proceedings before your commissioner without a preliminary hearing or dismissal of the complaint is filed in the office of the Clerk of this Court."

A. That is correct.

Q. Now, this document that you have in your possession, what is that?

A. That is a letter from F. Russell Millin, U. S. Attorney to me asking—no, it isn't. It is a letter from Mr. F. Russell Millin to Mr. Max Jaben informing him of the continuance to May 22, 1963 at 2:00 p. m. in the preliminary [fol. 8] hearing before me. A copy was sent to me.

Q. You kept that in your record?

A. I kept it in my file.

Mr. Shenker: Would you mark this as an exhibit, please?

(Defendant's Motion Exhibit 3 marked for identification.)

By Mr. Shenker:

Q. Now, this which you have described as a letter from Mr. Millin to Jaben, of which you were sent a copy is identified as Defendant's Motion Exhibit 3?

A. Yes, it is.

Q. Now, is this a document that also came from your files?

A. Yes, it came from my files.

Q. What is that?

A. I believe that to be the carbon copy of the typewriting on the summons that I issued that day.

Q. That would be the carbon copy of the summons that you issued?

A. Not the full summons, but I mean the typewritten part of the summons.

Q. It is not complete?

A. It is not complete on its face, no.

Q. Now, do you have any other records or did you have any other records pertaining to this?

A. Pertaining to this complaint and this summons?

[fol. 9] Q. Yes?

A. Yes, I handed in to the Clerk of the Court some of the papers.

Q. Are they in the clerk's office now, do you know?

A. I don't know where the file is.

The Court: The file is up here, the clerk's file.

By Mr. Shenker:

Q. Would you please refer to this file and then select which ones of the documents you sent in to the clerk's office?

A. This document here is a copy of the transcript, the original transcript that is your Exhibit 1.

Mr. Shenker: May we remove those particular documents from the file so the witness can identify them?

The Court: Why don't you leave them in there and have them identified as they are? The Court will let him remark on the reports.

Mr. Shenker: As they are in the file.

By Mr. Shenker:

Q. You select which ones are the papers that you forwarded to the clerk's office.

A. This is my copy of the transcript, that is your Exhibit 1, and filed in the Clerk's office on June 13th, and there is the original summons, but I didn't give that to the clerk. I may have given that to the clerk, it may have come through me after it was served. It was served here in Kansas City. It probably came through me and I gave [fol. 10] that to the clerk, and here is the original complaint which I handed to the clerk. Of course, this bond is not in the transaction that you are talking about. This is a bond on the indictment.

Q. So the bond isn't yours. Were there any other papers that you sent over there?

A. This is a transcript on the indictment, so that is not in my file. This is the warrant on the indictment, so I sent that, but not in this transaction. This would bear another number.

Q. Now, this warrant, the copy of the paper that you identified as being the summons, isn't that the one that relates to the warrant on the indictment?

A. Well, let's compare it. This is my subpoena which I will put in my pocket. Let me make a comparison to the summons and I can answer your question. This is a carbon copy of the typewritten portion in the summons, not the warrant. This is the number of the case that matches this. This is not a copy of the warrant.

Q. This is not a copy of the warrant so this then was issued. When was this issued, on April the 15th?

A. Yes, that is correct.

Q. And, now, is there anything else then that relates to the transcript, that relates to your record pertaining to the transcript?

[fol. 11] A. They are no longer in my record, but they originated with me. Here is the original summons and then we had—there is the copy of the transcript that I filed with the clerk's office.

Mr. Shenker: Let me have these identified then.

(Defendant's Motion Exhibits 4, 5, and 6 marked for identification.)

By Mr. Shenker:

Q. I show you then, Defendant's Motion Exhibits 4, 5, and 6, and ask you if these are the documents about which you just testified?

A. Number 4 is the carbon copy of my transcript filed with the U. S. District Clerk, Mr. Truman, on June 13, 1963. Exhibit Number 5 is the original summons issued by me, and your Exhibit Number 6, is the original complaint filed before me.

Q. Now, do these, together with those you have previously identified from your files, does that constitute the entire record of the proceedings before you?

A. I believe it does. I think so.

Q. Now, Judge, do you recall the time of the day or night, Mr. Thompson appeared before you?

A. I don't recall. It wasn't at night.

Q. It was in the day time?

[fol. 12] A. It was in the day time but I can't tell you what time of day.

Q. Do you recall just what you did at the time, if anything?

A. I recall I think, yes, what I did.

Q. Will you tell us, please?

A. Well, Mr. Thompson accompanied by Mr. Featherstone, came to my office with a complaint, the complaint that is in the court file, and I don't from my own personal memory remember this, but I am informed they didn't bring a summons with them, and borrowed a summons from me, and went and had a summons prepared and brought it back to my office. The first thing I do when a complaint is presented to me is to give it a number, which in this case was Docket No. 27 Case No. 229, so I wrote the numbers in. I read the complaint and decided it was sufficient, and signed my name to the summons.

Q. Is that everything that took place there?

A. No, that wasn't everything. A copy of the complaint, carbon copy I am sure was prepared and I certified with

a rubber stamp certification and my signature it was a true copy of the original, then the original summons and the certified copy which would be a carbon copy of the complaint was taken by either Mr. Thompson or Mr. Featherstone to the Marshal's office.

Q. That was all that took place at that time?

[fol. 13] A. At that time, yes.

OFFERS IN EVIDENCE

Mr. Shenker: I believe that is all of this witness. I would like to offer into evidence, if the Court please, the Defendant's Motion Exhibits 1 to 6 inclusive.

The Court: Admitted in evidence.

(Defendant's Motion Exhibits 1 to 6 inclusive, received in evidence.)

Mr. Hansen: No questions, your Honor.

The Court: Do you want the witness any more?

Mr. Shenker: No.

The Court: You will be available.

Mr. Cisel: I will either be at my office or in the Commissioner's office.

Mr. Shenker: Judge, we are keeping these exhibits here perhaps by agreement.

Mr. Cisel: After your hearing I will get them back?

Mr. Shenker: We can do that, we would arrange to have photostats made.

Mr. Cisel: My record will be incomplete.

Mr. Shenker: Is it agreeable that we might substitute photostats of this, to have the clerk do so?

The Court: Yes, that will be all right.

Mr. Shenker: We will do that, thank you very much.

(Witness excused.)

[fol. 14] DAVID A. THOMPSON being produced, sworn and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Shenker:

Q. Will you please state your name?

A. David A. Thompson.

Q. And your occupation?

A. I am a special agent, Intelligence Division, Internal Revenue Service, Kansas City.

Q. For how long have you been engaged in that capacity?

A. For approximately ten years.

Q. Now, I will ask you, Mr. Thompson, I will show you that which has been identified as Defendant's Motion Exhibit 6, and ask you to state if that contains your signature?

A. It does.

Q. That is the complaint. Now, Mr. Thompson, in that document you state that you consulted—do you have a copy of that document?

A. Not with me, no.

Q. In that document, sir, you state that you consulted private records reflecting the taxpayer's income. Right?

A. Yes, sir.

Q. Will you tell us what private records you saw?

Mr. Hansen: To which we object. Your Honor, Mr. [fol. 15] Shenker is seeking to go into the matter of probable cause for the issuance of the summons on complaint. We respectfully submit that the question of probable cause must be determined from the complaint itself received before the Commissioner, and several courts, including the Court of Appeals for this circuit have held that once an indictment has been returned, as has occurred in this case, that the question of probable cause is not open to question after that, except as regards the sufficiency of the complaint itself.

The Court: I am seeking light, gentlemen. Where you have the situation you have here, if the complaint was invalid, what is the situation then?

Mr. Shenker: That is exactly the reason we contend that we are entitled to that information.

The Court: In other words, you have a deadline, gentlemen, if the complaint was invalid, there would be no justification for issuing the summons. Then the statute has run and your indictment would be barred by the statute of limitations.

Mr. Hansen: That is correct, sir.

The Court: Under those circumstances, I am not prepared to state at this moment, without investigation, the matter has never been before me, no decision on the matter. I think you have a situation here that is different than the [fol. 16] ordinary proceeding. Certainly after the summons has been issued, the complaint has been filed and the summons has been issued, and thereafter an indictment is returned, the proceedings are *functus officio*. They have served the purpose of tolling the statute of limitations, but if that proceeding be invalid, then the subsequent action of the grand jury in returning an indictment which would otherwise be barred by the statute of limitations—that is the question that is presented by you gentlemen, and I am frank to say that to me it is a new situation. That is one of the vices of waiting until the last minute, as so often happens, by the Department of Revenue, the last hour of the last minute, the last minute of the last day to file these things.

It has happened before, but I haven't seen the section raised. I am going to admit it, gentlemen. I don't see what harm it can do. I think it is a matter that we will have to meet ultimately, so I think we just as well meet it head on, gentlemen, and see where we are going with it.

Mr. Hansen: I don't understand what the purpose of Mr. Shenker's question is. I don't understand where he intends to go in this examination.

The Court: I don't know either. I can anticipate up to [fol. 17] a certain point, but beyond that I cannot.

Mr. Hansen: Of course, the Government is very much opposed to Mr. Shenker bringing out who the witnesses are in this case.

The Court: I shall not permit that to be done, gentlemen. That will come up on another matter. He is asking what record he saw. I think that is as far as his question goes.

So far as the witness is concerned, we are going to get at that on a subsequent proceeding and subsequent motion here.

By Mr. Shenker:

Q. Mr. Thompson, do you recall the question?

A. Just what private record.

Q. Yes, what private records you saw pertaining to the taxpayer's income, which you say in here that you saw private records reflecting the said taxpayer's income. My question is, what private record you saw reflecting the taxpayer's income?

Mr. Millin: The Government objects to that question. It is like asking for the name of witnesses here, getting into the Government's case.

The Court: Overruled.

A. I saw partnership records of various partnerships that were reflected on the taxpayer's income tax return. I looked at those records.

[fol. 18] Q. Any others?

A. And if I understand the meaning of the term, "private", this would probably cover that field.

Q. Beg pardon?

A. This is a matter of interpretation for me what is private records. This is all I can interpret from that. I looked at lots of records but private records, I am not sure I understand what you mean.

Q. Well, the word "private" record was used by you in the complaint, isn't that right?

A. Yes.

Q. I had nothing to do with the preparation.

A. I interpreted it that way in this too.

Q. So what did you include on that then?

A. Well, the partnership record is what I would include on that.

Q. Partnership records?

A. Yes, sir.

Q. Anything else?

A. That would be all.

Q. All right, now, what partnership records were there?

A. There were partnerships involving the Baltimore Avenue Association, the Holmes Hotel, the Main Street Investment Company, 1122 Penn Building Company, the Midwest Exchange.

Q. You said the Baltimore Avenue Association, Main Street Investment Company, what was the next one?

[fol. 19] A. 1122 Penn Building Company, Holmes Hotel. Did I name five?

Mr. Quinn: Just four.

By Mr. Shenker:

Q. You mentioned something about a Midwest?

A. Midwest Exchange.

Q. That makes the five. That is all the private records, and all of the records that you had in mind when you said you examined private records?

A. These are the records that I personally looked at.

Q. Now, where did you examine those records?

The Court: Now, gentlemen, the objection has been made. I think solely the question before this Court is the basis for this witness' affidavit made before the Commissioner to justify the issuance of the summons. Anything that he saw that gave to him the justification of the statement that he made, I think is sufficient. He saw those records. We are not going to get into the whole field. I am going to sustain the objection, beyond what you have gone into.

Mr. Quinn: It would seem to make a difference from the legal standpoint if the defendant filed these reports

with the Government, or if the partnerships filed them with the Government, and Mr. Thompson examined them in the files of the Government.

The Court: What difference does it make? If the records indicated there has been failure to pay a tax on income, [fol. 20] he was justified in making the affidavit. I don't see as it makes any difference whether he examined them in the alley or in the Income Revenue Department, if the record indicated to him there had been a violation of the Internal Revenue law sufficient to base an affidavit. I think that is all that is necessary. You don't have to go into all of the details. If you want to make a record on it, go ahead.

Mr. Shenker: I think the question that I asked was premature. I would like to ask a different question, if the Court please.

By Mr. Shenker:

Q. Did you say you examined those records, you are talking about returns, or talking about records?

A. Records.

Q. I see. You testified that you interviewed third persons having knowledge of the taxpayer's financial condition. Can you tell us whom you interviewed?

Mr. Hansen: We object to that.

The Court: The objection is sustained. Now, gentlemen, we are not going to try this case, we are simply going to try the sufficiency of the affidavit and the fact that this man had grounds to make the statement that he made. We are not going to go into the question of witnesses, whether he had a right to rely on them. I don't think the law goes that far, for the signing of the affidavit.

[fol. 21] Mr. Shenker: Of course, the question is this, your Honor, that unless we know who he talked with, the Court is not in a position to determine whether he had reasonable ground to rely on those people or not, or whether those people had knowledge of it.

I might say, your Honor, that the best way to really prove it would be—and I didn't get to that point as yet,

is to produce the report that they wrote in connection with this case which would then show who they talked with, and the information, if any, he got from them.

The Court: I am not going to require him to reveal the names of those witnesses at this time, gentlemen.

By Mr. Shenker:

Q. Now, I will ask you this, Mr. Thompson, did you write a report on this case prior to the time that the complaint was filed?

A. Yes, sir.

Q. You did. Do you have that report?

A. Yes, sir.

Q. May I see it?

Mr. Hansen: If the Court please, we object.

The Court: The objection is sustained.

By Mr. Shenker:

Q. That report would contain the persons that you spoke with, the identity of the persons that you spoke with and what they said, is that correct?

A. Yes, sir.

Q. And it will contain the information on which you acted, is that correct?

A. Yes, sir.

[fol. 22] Mr. Shenker: May we request it, we have previously issued a subpoena requesting that the report may be produced in order that we may determine as to whether or not probable cause existed for the filing of this complaint.

Mr. Hansen: To which we object.

The Court: The objection is sustained. Gentlemen, I don't believe the law requires the Court to go into all of the reasons and ramifications for the making of an affidavit for the summons. I don't believe it does. I think there must be some justification for it, but I think if we do that, the Court would spend half of its time inquiring into the question of whether the agent had reasonable cause to request the issuance of a summons.

We just as well settle it right now. I am not going to do it. The objection is sustained.

I might say for the purpose of clarifying the Court's statement, the question is whether or not the Commissioner was justified in issuing the summons upon the statement that was then before him. Am I correct in that?

Mr. Shenker: That is correct, your Honor.

The Court: Now, gentlemen, the Commissioner—the agent comes in asking for a summons, a warrant, and he says he has information about a matter, that he has investigated it, do you think it is necessary that the Com-
[fol. 23] missioner say, "Who did you talk to"? In other words, does the Commissioner have to try the issue to determine whether or not the agent's information is sufficient upon which to base or issue the summons?

Now, it is my thought that he doesn't have to do that. If the agent comes in and says, "I have investigated the matter and have certain things he has done", and makes the oath and affidavit to that effect, I think that is sufficient upon which to issue the summons. It depends upon whether or not the matter that was set out in the affidavit was sufficient.

Now, I think that is the issue. Now, where did you get them? He doesn't have to try that issue. If it were otherwise, the Commissioner would have to say, "I don't believe he did that", or, "Are those people reputable"?

Now, I think it is a little different situation where you have probably an application for a search warrant, the police officer relies upon the statement of a stool pigeon or an informer or something of that kind, it might be well to ask him questions before and secure information, "Have you been able to rely upon the information he has given to you heretofore?" I don't think it is a comparable situation. That is the Court's reason for excluding this testimony. It isn't what this Court thinks about it. It is whether or not the Commissioner was justified at the time the in-
[fol. 24] formation was taken before him in issuing and signing the summons.

I think the information that he examined the books, I think that is probably competent, but to go out into the

broad field, I don't think that is competent. That is the basis for the Court's action now.

By Mr. Shenker:

Q. Mr. Thompson, when did this investigation of Mr. Jaben begin?

A. About April, 1961.

Q. April of 1961?

A. Yes, approximately. Now, I would like to clarify that a little bit. That is when my interest in the case began.

Q. I see. In other words, you are the special agent and you came in in April, 1961?

A. That is right. There has been an investigation before that.

Q. Was your office in it before that time?

A. No.

Q. Now, when did the general agents begin the investigation?

A. This I have no personal knowledge of.

Q. Would the record show that?

A. Our records probably don't.

Q. Your records probably don't show it. To be exact, Mr. Thompson, or as close to being exact as you can be, do you know about when you wrote your report in connection with this investigation?

[fol. 25] Mr. Millin: If I understand the Court's ruling, this is the question we objected to as immaterial and irrelevant to the issues.

The Court: This isn't the question. The question he asked a moment ago was what was in the report and to produce the report. Now he is asking when it was written.

I anticipate Mr. Shenker; if I recall he has raised the question in one of his motions, well if there is such a thing as laches, but the theory is that you slept on your rights, waited until the last minute and therefore, you ought not to be permitted to prosecute then. That is the theory. Now, I disagree with Mr. Shenker about that, but I think he ought to be permitted to make the record on that.

In my opinion, the Government has a right to file the information up until, as I said, the last minute of the

last day before the statute of limitations runs, and it seems to be the law, if I understand that, to file an information tolls the statute of limitations.

Now, if Mr. Shenker has a theory that that isn't the law, I think he ought to be allowed to make the record. When we get to the proper place, the Court will entertain objections, but I will permit him to make the record. Generally, that is your theory, Mr. Shenker, am I correct in that?

Mr. Shenker: That is correct, your Honor.

[fol. 26] The Court: Of course, the Court is anticipating him. We will see where he goes.

I assume, gentlemen, that there really isn't any dispute about this matter, is there? The matter has been under investigation for a long time, several years? The Court doesn't go by rumors, but it has been rumored for a long time it was under investigation.

Mr. Shenker: That is my understanding.

The Court: Probably for several years, I don't know. It has been a long time at any rate, that is only rumor, I know nothing about it, but I suspect the Government would probably be willing to stipulate it has been under investigation for whatever time it has been under investigation, I don't know. If you want to make your record, I want you to do it.

Mr. Shenker: Of course, if the Government will tell me when it started and when they wrote the report, that is all my question is at this time.

The Court: The Court will permit that to be done just solely for the purpose of making your record, but not what is in the report. So, if you know, Mr. Thompson, when the report was written, you may so state.

A. I believe it was January of 1963. I think in fact, it was January the 11th, when it was completed.

By Mr. Shenker:

Q. To the best of your recollection, it was January 11, [fol. 27] 1963, that you wrote the report?

A. That it was completed. It takes a long time to write one of those reports.

(Defendant's Motion Exhibit No. 7 marked for identification.)

By Mr. Shenker:

Q. I will show you, Mr. Thompson, that which has been marked as Defendant's Motion Exhibit No. 7, and ask you to state if you are familiar with that letter?

A. I don't specifically recall seeing this before.

Q. Would you say you are not familiar with it?

A. I don't recall seeing it before, no, sir.

Mr. Shenker: Will the Government stipulate that is a letter from the Justice Department?

Mr. Hansen: Yes, sir.

OFFER IN EVIDENCE, OBJECTION THERETO SUSTAINED

Mr. Shenker: Very well, it can be stipulated, if the Court please, by counsel that this Defendant's Exhibit 7 was a letter addressed to the defendant by the Justice Department, February the 12th, 1963, and that it is signed, Louis F. Oberdorfer, Assistant Attorney General, Tax Division, by Fred G. Folson, Chief Criminal Section of the Tax Division. We would like to offer Defendant's Motion Exhibit No. 7 into evidence.

Mr. Hansen: To which the Government objects on the ground that it is irrelevant and immaterial.

The Court: Gentlemen, the objection will be sustained, [fol. 28] except as to the fact it is dated February 12, 1963, the objection will be sustained.

Mr. Shenker: No additional offer of proof is necessary since this is a document?

The Court: No, the objection is sustained, except as to the fact it is dated February 12, 1963, and hasn't anything to do with the length of time the matter has been under investigation. So, it is purely a current letter.

Mr. Shenker: The purpose of it, your Honor, the reason for the offer of this letter is that this is subsequent to the

report that was written by this witness who was the agent in charge of the investigation.

The Court: The objection is sustained.

Mr. Shenker: This is all, if the Court please, I have of this witness in view of the Court's ruling, in support of the Motion to Dismiss.

We do need him in support of the Motion to Suppress, but I thought I would stop now.

The Court: Any questions?

Mr. Hansen: No questions by the Government.

The Court: That is all, thank you, Mr. Thompson.

Mr. Shenker: Shall we argue the Motion to Dismiss now, if the Court please?

The Court: No, let's go on with the rest of it. Let's get through with the testimony and then you can argue it.

[fol. 29] Mr. Shenker: This is a different motion. This is evidence, if the Court please, that we intend to offer in support of the Motions to Suppress the evidence.

By Mr. Shenker:

Q. You are the same Mr. Thompson who testified a few minutes ago?

A. Yes.

Q. Mr. Thompson, I will ask you to state if you had occasions to obtain books and records of any partnerships in which the defendant appeared as a partner? I am talking about books and record or documents?

A. Yes, sir.

Q. You have, and I will ask you to state, sir, which books and records did you obtain?

Mr. Hansen: The Government objects, your Honor, to the allegations of the motion. They are pointed in no direction at all. I don't think the allegations of the Motion to Suppress are sufficient to support an exploratory examination into what the witness did here.

Mr. Shenker: Well, this is not asking, if the Court please, the contents of the books and records. This is asking the witness if he obtained those and under what circumstances he obtained them, it being our contention that they were

improperly obtained, and therefore, they should be suppressed.

The Court: Suppose we hear the testimony. Overruled. [fol. 30] We are not going into the question of what is in the books. We are going into the question of what the books are and how they were obtained, solely for determining that issue.

By Mr. Shenker:

Q. Do you remember the last question?

A. It is difficult for me to answer in the way that the question is phrased, because in most instances I didn't obtain them. I looked at them as stated in the complaint, but I have to say that actually obtaining records myself, I obtained very few. Let me think which ones I did.

Mr. Millin: The motion which was filed talks about the documents and objects that were obtained from the defendant. The question that he asked is broader than the document that he filed.

The Court: I assumed they were from the defendant.

A. No, I obtained nothing from the defendant. I misunderstood the question.

By Mr. Shenker:

Q. I think that my question didn't limit it to obtaining it from the defendant. My question was predicated on your testimony that the previous motion wherein you stated that you examined books and records relating to partnerships in which the defendant was a partner, and my question now is, again, in support of my Motion to Suppress, what books and records you examined and where you did examine them that related to partnerships in which the defendant is [fol. 31] a partner.

A. I looked at the records of the Holmes Hotel and the Midwest Exchange in the offices of Abe Rosenbaum.

Q. Who is that?

A. Abe Rosenbaum, Certified Public Accountant.

The Court: What hotel?

The Witness: Holmes Hotel and Midwest Exchange.

The Court: In the office of whom?

The Witness: Abe Rosenbaum, a Certified Public Accountant. I looked at a record of sorts.

By Mr. Shenker:

Q. What?

A. I looked at a record of sorts consisting mainly of one piece of paper in the office of Norris Clark, a CPA, accountant for Mr. Phil Madeo that related to the Main Street Investment Company.

Q. Was the defendant given as one of the partners in that?

A. Yes. I looked at the record pertaining to the 1122 Penn Building Company in the Intelligence Division office, said records were obtained by another agent.

Q. Now, was that an agent of the Intelligence Division?

A. No, sir.

Q. It was a revenue agent?

A. I would have to qualify that, to my knowledge. It could have been a special agent involved in that, but to my knowledge it was a revenue agent.

[fol. 32] Q. Do you know where they got that record or those records?

A. Which property was I referred to?

Q. That is the 1122 Penn Building Company.

A. I have no personal knowledge of where they got that. I think as I recall, it was from Mr. Presta, from Mr. Presta's office.

Q. You don't know where it was gotten?

A. I am not sure, no, sir.

Q. And do you know what agent, the name of the agent that obtained that?

A. M. K. Concannon.

Q. That is the 1122 Penn, is that right?

A. That is right.

Q. All right, any other records?

A. I would first like to state that I am not positive it was Concannon. I know it was a revenue agent, I don't recall for sure.

Q. Your record would show that, isn't that right?
A. Probably.
Q. Do you mind referring to your report to see if you can enlighten me on this?

Mr. Hansen: I think it is all immaterial.
The Court: Yes, I think so too. I don't think there has been anything showing who it was obtained it. Even if they had been obtained from somebody, that somebody [fol. 33] else is not a party to this litigation.
Mr. Shenker: I can't show it all at one time, your Honor.

By Mr. Shenker:

Q. All right, any others?
A. The Baltimore Avenue Association records were in the files of the Intelligence Division when I looked at them.
Q. Do you know who obtained those and from whom?
A. No, I don't. I don't recall at the time.
Q. Your report would show, isn't that right?
A. I don't think so.
Q. In other words, you don't think that your report would show as to who obtained those records and where they obtained them?
A. No, sir, because the Baltimore Avenue Association record pertained to various cases being worked by this office, and I had access to looking at them like other agents did, and I saw no reason why I should write the story.
Q. But somewheres in your file it would show?
A. Someone probably has a record of it, yes, sir.
Q. All right, any other records?
A. I believe I have covered all of the partnerships, didn't I? Did I leave out a partnership?
Q. I can't say, I am not familiar with it.
A. There are five partnerships.
Q. You mentioned five.

[fol. 34] The Court: Yes, he mentioned five.

By Mr. Shenker:

Q. Now, when you examined the record of the Holmes Hotel and of the Midwest Exchange, did you have permission of Mr. Jaben to examine those records?

A. I had an oral admission, yes, sir.

Q. Permission or admission, which is it?

A. He made the statement in an interview that he referred us to Mr. Presta to see about certain records of the partnership and he also said, "You are welcome to look at the record on these partnerships", and that is what we did.

Q. Just a broad statement like that, is that right?

A. I don't think it was very broad because I covered each item specifically and specifically he made this statement to me as pertains to each partnership.

Q. Was Mr. Jaben present at the time you examined that?

A. No, sir, he was not.

Q. Did you make any copies of them?

A. Yes, sir, we did.

Q. Photostatic copies?

A. Photostatic and transcripts,—true copies.

Q. And you have those?

A. Yes, sir, we do have.

Q. Now, with reference to the records of the Main Street Investment Company, did you have a subpoena for the examination of those records pertaining to the Holmes [fol. 35] Hotel and Midwest Exchange at that time?

A. I believe subpoenas were issued in all these cases.

Q. Was that prior to the time you looked at them, or after you looked at them?

A. Prior.

Q. Prior to the time you looked at them?

A. Yes, sir.

Q. And now the record of the Main Street Investment Company that you said that you examined in the office of Norris Clark, a CPA. Was Mr. Jaben present at that time?

A. No, sir.

Q. And did you have any written authority to examine those records?

A. I believe we issued a subpoena in that case too.

Q. And did you make copies of those records?

A. Yes, sir.

Q. Photostatic copies as well?

A. A photostatic copy as I recall.

Q. Now, with reference to the 1122 Penn Building Company, is that the name?

A. That is the way I recollect, 1122 Penn Building Company.

Q. Now, with reference to those records, you said that they were in the Intelligence Division's office, is that correct, that they were obtained by some other agent?

A. I think I stated they were obtained by another agent, yes.

[fol. 36] Q. You knew of no circumstances under which they were obtained?

A. No, sir, not of personal knowledge.

Q. And did you make use of them?

A. Yes, sir, I did.

Q. The same thing is true of the other records about which I questioned you, you made use of them?

A. Yes, sir.

Q. And is the same thing true with reference to the Baltimore Avenue Association?

A. I don't believe so, this is recollection, but the Baltimore Avenue Association records were used primarily for verification of income shown on the taxpayer's return. I don't believe I made any copies of anything that would be pertinent to the tax case.

Q. But they were used by you?

A. I looked at them, yes.

Q. Now, were there any other records which you consider private that you examined or obtained or made copies of?

Mr. Millin: That is beyond the scope of the motion he has filed, if your Honor, please.

The Court: Overruled.

A. I believe that is all I can recall right now. I think that is it.

By Mr. Shenker:

Q. I believe you testified that the defendant was not present at the time any of those records were examined?

[fol. 37] A. That is correct.

Q. By you?

A. That is correct.

Q. Did you show the defendant any of those records?

A. No, sir.

Q. I believe you testified that Mr. Concannon might have been the one that got the 1122 Penn Building Company records. Do you know how long Mr. Concannon was investigating the case prior to the time you came in?

A. I can give you a guess. My recollection. I don't know exactly. Six months probably.

Q. That is purely a guess?

A. He was assigned the case, investigating that long I would say, not for that, but assigned, yes, but we will often times get an assignment and won't do much with it.

Q. You say it is purely a guess?

A. He did some work for maybe six months. I don't know, maybe longer. I can't answer that.

Mr. Shenker: I believe that is all.

Examination.

By the Court:

Q. May I inquire, Mr. Thompson, if you know from the records you examined of these five companies or whatever they are, corporations or partnerships?

A. Yes, sir, most of them are partnership, the Baltimore [fol. 38] Avenue Association at one time was a corporation, and so was the Midwest Exchange incorporated. Just exactly when they were changed from partnerships to corporations, I would have to check. Most of them were partnerships though.

Direct examination.

By Mr. Shenker:

Q. Let me just ask you, just one more question that I can think of. Did you examine any records in the office of the Prosecuting Attorney for Kansas City?

Mr. Hansen: For which we object, it is irrelevant and immaterial.

The Court: Overruled.

A. One thing I don't believe, I want to amend one statement. I am not sure the Baltimore Avenue was ever incorporated. I think maybe that was always a partnership.

The Court: Now, the question is asked you, did you investigate any of them in the Prosecuting Attorney's office?

A. No, I did not investigate records in the Prosecuting Attorney's office.

By Mr. Shenker:

Q. Did you look at any records in the Prosecuting Attorney's office that reflected the activities of the defendant?

The Court: You are referring to the Prosecuting Attor-
[fol. 39] ney of Jackson County?

Mr. Shenker: That is right.

A. Excuse me. Yes. Before I thought you meant the U. S. Prosecuting Attorney.

Q. No, the county.

A. The Baltimore Avenue Association records were there and I think I did look at them, a cursory look at one time.

Q. Any other records?

A. No, sir.

Q. Make any notes?

A. Not in his office, no, sir.

Q. Were you only looking at those records in the Prosecuting Attorney's office in Jackson County just one time, is that the idea?

A. One time is all I recall. I looked at them later at our office.

Q. Oh, you did look at them. How much later?

A. I don't recall. Sometime later I don't recall exactly.

Q. Did you see any other records in which the partnership or the individual in which the defendant was a partner in addition to the Baltimore Avenue Association records?

A. No, sir.

Q. But you recall at least twice you went in and looked at them?

A. Once at the Prosecuting Attorney's office.

Q. I thought you said that you looked at them later, but [fol. 40] not in the Prosecuting Attorney's office?

A. No, sir, once is all I recall there.

Q. Did you take any record from the Prosecuting Attorney's office?

A. I think some of those records were taken up for photostating because we had some copies, but I didn't do it personally. I don't know how we got hold of the records. I don't know, but if I had anything to do with it I don't recall it at this time.

Q. But your office was?

A. We had copies of the records and I don't recall how we got them now.

Q. In other words, it was done either by you or members of your office?

A. Yes.

Q. I see. You don't recall any particular individual in your office?

A. No, I don't recall the exact time and exactly how it was done.

Mr. Shenker: My bosses tell me that is all, your Honor.

The Court: The time to quit is when the bosses say so.

Mr. Hansen: No questions.

The Court: That is all, thank you, Mr. Thompson.

[fol. 41] Mr. Shenker: If the Court please, in view of the testimony of this witness, I am certain that we should like to renew our request for the report that was made by this witness with reference to these investigations, and also in support of the Motion to Suppress the evidence.

Mr. Hansen: The Government objects.

The Court: The objection is sustained.

Mr. Shenker: May we have, if the Court please, about three minutes, I want to confer.

The Court: Yes, we will take a little recess.

Whereupon, a recess was taken.

After the recess, the following proceedings were had and entered of record:

Mr. Shenker: If the Court please, we have two more questions from Mr. Thompson.

By Mr. Shenker:

Q. Mr. Thompson, the records that you examined in the Prosecuting Attorney's office, that was before January the 11th, 1963, before you wrote your report?

A. That is correct.

Q. And then do you know whether or not a subpoena was issued for those records to the Prosecuting Attorney's office?

A. No, sir, I don't know.

Q. Well, you had no subpoena when you went there to examine them?

A. I don't recall.

Q. Well, do you know whether you went to the United [fol. 42] States Attorney's office and requested a subpoena?

A. We don't do that, sir. I have the authority to issue one myself.

Q. Do you know whether you issued one?

A. I don't think so. I don't recall, though.

Q. Your report would show whether you did or not?

A. My report won't show, but I might have something in the file.

Q. Your file would show whether you did or not?

A. It would show whether I did, if there is one in there.

Q. That is what I say, that is correct, it would show whether you did, but to the best of your recollection, you believe there was no subpoena?

A. I don't believe so. Not for my part.

Mr. Shenker: That is all.

Mr. Hansen: That is all.

(Witness excused.)

* * * * * * *

[fol. 42a] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 43] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 21547-3

UNITED STATES OF AMERICA, Plaintiff,

vs.

MAX JABEN, Defendant.

MEMORANDUM AND ORDER—September 4, 1963

On May 17, 1963, the Federal Grand Jury returned an indictment in three counts against the defendant, in this Court. In the first count it is charged:

"That on or about the 16th day of April, 1957, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $17,665.31 and that the amount of tax due and owing thereon was the sum of $6,017.32, whereas, as he then and there will knew, his taxable income for the said calendar year was the sum of $40,001.76, upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C., Section 7201."

[fol. 44] .In the second count it is charged:

"That on or about the 15th day of April, 1958, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, did wilfully and knowingly make and subscribe and file and cause to be filed with the District Director of Internal Revenue for the Internal Revenue Collection District of Kansas City, Missouri, at Kansas City, Missouri, a Form 1040 United States Individual Income Tax Return for the calendar year 1957, which was verified by a written declaration that it was made under the penalties of perjury, which said Form 1040 United States Individual Income Tax Return for the calendar year 1957 he did not believe to be true and correct as to every material matter in that in the said Form 1040 United States Individual Income Tax Return for the calendar year 1957 he stated that his taxable income for the calendar year 1957 was the sum of $22,370.02 and that the amount of tax due and owing thereon was the sum of $7,364.60, whereas, as he then and there well knew and believed he had during calendar year 1957 received taxable income of $25,466.47 upon which said taxable income he owed to the United States of America an income tax of $7,430.58.

In violation of Section 7206(1), Internal Revenue Code; 26 U. S. C., Section 7206(1)."

In the third count it is charged:

"That on or about the 13th day of July, 1959, in the Western District of Missouri, Max Jaben, late of Blue Springs, Missouri, who during the calendar year 1958 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1958, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated

that their taxable income for said calendar year was the sum of $14,020.13 and that the amount of tax due and owing thereon was the sum of $3,333.64, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $24,039.46, upon which said taxable income there was owing to the United States of America an income tax of $6,816.97.

[fol. 45] In violation of Section 7201, Internal Revenue Code; 26 U. S. C., Section 7201."

The defendant has filed Motion to Dismiss the indictment on the ground that:

"1. The indictment is vague, indefinite and duplicitous; it fails adequately to inform the defendant of the charges against him, as required by the Sixth Amendment to the Federal Constitution; the indictment fails to allege all of the elements of the offenses attempted to be charged; it would not bar a subsequent prosecution for the same offense; and it deprives the defendant of the right to be charged by a grand jury, in that, the language is so general it would allow the Government to secure a conviction of the defendant based upon facts not found by, and perhaps not even presented to, the grand jury which indicted him."

I am unable to find anything indefinite or duplicitous in the indictment, or that it fails to adequately advise the defendant of the nature of the charge against him. It clearly alleges the nature of the offense and would be a bar to any subsequent prosecution for the same offense.

The second ground of the motion is that Count I of the indictment is barred by the six year statute of limitations, and that the filing of the complaint on April 15, 1963, did not toll the running of the statute.

The third ground alleges that the Government is guilty of laches and unnecessary delay in the filing of the complaint and presenting the case to the grand jury, and that:

[fol. 46] "* * * and as a result, defendant was denied his right to a 'speedy trial' under the Sixth Amend-

ment to the Federal Constitution; and further, the unnecessary delay on the part of the Government was in violation of Rule 48(b) of the Federal Rules of Criminal Procedure."

Clearly, the complaint was filed within the statutory period. It is not an uncommon practice on the part of the Government to delay the filing of a case to the last minute. A complaint or charge may be filed any time within the statutory period.

The filing of a complaint before the Commissioner within the period of limitation has the effect of tolling the statute, and a conviction obtained under an indictment returned thereafter is not barred by the statute of limitations. 26 U.S.C.A., §6531; *Zacher* v. *U. S.*, 227 F. 2d 219 (C. A. 8, 1955); *U. S.* v. *DeHardit*, 120 F. S. 110 (E.D.Va. 1954).

The question of whether or not one charged with an offense has been denied a speedy trial must be considered from the time of the filing of the charge, and not from the period from which it could be charged within the period of limitation.

Upon oral argument, the defendant strenuously urged that the affidavit upon which the complaint was issued was not sufficient to justify issuance of the summons by the Commissioner.

[fol. 47] The significance of this issue, of course, is that if the complaint was insufficient, then the statute of limitations was not tolled, and an indictment thereafter returned by a grand jury would be barred by the six year statute of limitations.

The affidavit was signed by a special agent of the Internal Revenue Service, who stated that he had conducted an investigation into the income tax liability of the defendant for the year in controversy by examining the defendant taxpayer's tax returns for the year 1956 and other years, by identifying and interviewing third parties with whom said taxpayer did business, by consulting private and public records and by interviewing third persons having knowledge of the taxpayer's financial condition.

He stated that he had personal knowledge that the defendant did unlawfully and illegally evade and defeat the

income tax due and owing by him to the United States for the year 1956, by causing to be filed and filing with the District Director of Internal Revenue at Kansas City, the false and fraudulent income tax return.

On examination at the hearing on these motions, the agent testified that he had examined the books and records of the defendant, that they were made available to him and that it was from that information that he stated he was familiar with and knew of the matters or facts to which he made oath.

[fol. 48] Apparently the agent had access to the books and records and documents which will be used by the Government in attempting to prove its case, and obtained the books and records of the defendant indicating the source of his income.

The statements contained in the complaint were based on information developed in the investigation conducted by the special agent who swore to the complaint. The factual situation here is not the same as that in *U. S.* v. *Langsdale*, 115 F. S. 489 (W. D. Mo. 1953) decided by this court, but is similar to that in *U. S.* v. *Black*, 216 F. S. 645 (W. D. Mo. 1963) where a substantially similar complaint was approved by Judge Oliver of this Court. It is also in compliance with the teachings of *Giordinello* v. *U. S.*, 357 U. S. 480 and *Jones* v. *U. S.*, 362 U. S. 257.

The Motion to Dismiss is therefore overruled.

Defendant has also filed Motion for Bill of Particulars, in which he seeks a great mass of information, to some of which he is entitled, and some not. Without describing in detail the information sought by the defendant, suffice it to say that by limited bill of particulars the Government advised that it would proceed under the net worth and non-deductible cash expenditures theory in submitting its case, and on oral argument supplied the amount it claims as defendant's opening net worth.

[fol. 49] Under those circumstances, the Government will be required to furnish to the defendant, the sources from which the net worth was increased, categorized as to item and the deductions allowed to determine the earned net income for each calendar year.

With the above exception, the Motion for Bill of Particulars is overruled.

The defendant has also caused a subpoena to be issued directed to F. Russell Millin, United States Attorney, directing the production of:

> "1. All books, papers, documents and objects obtained from defendant or others by seizure or by process.
>
> 2. All books, papers, documents and objects obtained by the Government from others which the Government presented to the Grand Jury, expects to use at the trial, or is material to the trial or defense of this case.
>
> 3. All memoranda of any and all statements allegedly given by the defendant to Government agents, including letters, interviews, admissions or confessions."

A subpoena was also directed to David A. Thompson, the special agent who made the investigation directing the production of:

"1. All records or papers pertaining to the above case.

2. All statements and testimony made before the Grand Jury which indicted the defendant, and records and papers used in the testimony.

3. Special Agent's Reports and Revenue Agent's Reports".

[fol. 50] The Government has filed Motions to Quash the Subpoenas. The Government should be required to make available to the defendant, all books, papers, documents and objects obtained from the defendant or others seized pursuant to any process and not returned to the defendant or to others from whom they were obtained.

Any such books, documents and objects should be made available to the defendant in the office of the Clerk of this court for inspection, copying and photographing. This shall include all books, documents and papers obtained from others which the Government presented to the Grand Jury.

and expects to use at the trial if such items have not been returned by the Government to the sources from which they were obtained.

The subpoenas will be quashed as to all other matters requested.

This ruling also disposes of all matters raised in defendant's Motion to Produce and Motion for Discovery.

Defendant's Motion to Suppress Evidence was overruled in open court after reception of evidence and argument.

It Is So Ordered!

Richard M. Duncan, Judge.

Dated: September 4, 1963

[fol. 51] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

No. 21547

[Title omitted]

SUPPLEMENTAL MOTION TO DISMISS THE INDICTMENT—Filed November 1, 1963

Comes now the defendant and moves the Court for an order dismissing the indictment herein, and as grounds for said motion states and alleges the following:

1. The indictment and each count is vague, indefinite and duplicitous; it fails adequately to inform the defendant of the charges against him, as required by the Sixth Amendment to the Federal Constitution; the indictment fails to allege all of the elements of the offenses attempted to be charged; it would not bar a subsequent prosecution for the same offense; it deprives the defendant of the right to be charged by a grand jury, in that, the language is so general it would allow the Government to secure a conviction of the defendant based upon facts not found by, and per-

haps not even presented to, the grand jury which indicted him; and it fails to charge any offense under the laws of the United States, particularly Title 26 U.S.C., Sections 7201 or 7206(1).

2. Count I of the indictment on its face is barred by the six year statute of limitations, Title 26 U.S.C., Section 6531, and the statute is not tolled by the complaint issued, for the following reasons:

(a) The complaint and affidavit of Special Agent Thompson, in support thereof, is invalid on its face; the complaint [fol. 52] and affidavit are vague and indefinite; they are *pro forma* and merely state the conclusion of the affiant; they are, on their face, based on hearsay, and there is no basis alleged in the affidavit and complaint for crediting the hearsay; there are no facts alleged showing probable cause to believe defendant committed the offense alleged; issuing of the complaint and summons under the foregoing circumstances violated the probable cause requirement of the Fourth Amendment to the Federal Constitution; and the issuance of the complaint under these circumstances violated Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure.

(b) The Commissioner acted illegally, unlawfully and in violation of his duty in issuing the complaint and summons based upon the affidavit of Special Agent Thompson; he failed to accord defendant a hearing as required under Rule 5(c), thereby failing to give defendant the opportunity to "cross-examine witnesses against him" and present evidence for the purpose of determining whether there was in fact probable cause to believe he committed an offense; the Commissioner failed to make any sort of investigation or inquiry of Thompson before issuing the complaint and improperly issued the complaint based solely on the affidavit of Thompson; the issuance of the complaint and summons under the foregoing circumstances violated the probable cause requirements of the Fourth Amendment to the Federal Constitution; and the issuance of the complaint under these circumstances violated Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure.

(c) Special Agent Thompson did not in fact have probable cause to believe defendant had committed an offense when he swore under oath that he did have such evidence; the affidavit is *pro forma* and clearly was not prepared by Thompson; defendant was not given the opportunity to cross-examine Thompson before this Court as to his prob-
[fol. 53] able cause, or as required by Rule 5(c) of the Federal Rules of Criminal Procedure; if defendant is not to be permitted to cross-examine Thompson as to probable cause, the defendant is conclusively bound by the statement of a witness he is not entitled to cross-examine, which is contrary to Anglo-American jurisprudence and accordingly deprives defendant of due process of law under the Fifth Amendment; the issuance of the complaint and summons under these circumstances deprives defendant of due process of law under the Fifth Amendment and violates the probable cause requirement of the Fourth Amendment; and the issuance of the complaint under these circumstances violates Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure.

3. The Government was guilty of laches; there was unnecessary delay in filing a complaint in the instant case, and presenting the case to the grand jury; and as a result, defendant was denied his right to a "speedy trial" under the Sixth Amendment to the Federal Constitution; and further, the unnecessary delay on the part of the Government was in violation of Rule 48(b) of the Federal Rules of Criminal Procedure.

Morris A. Shenker, 408 Olive Street, St. Louis 2, Mo., CH 1-6116,

James Patrick Quinn, 1104 Oak Street, Kansas City, Mo.,

Kenneth Cohn, 700 Lathrop Building, Kansas City 6, Mo.,

Attorneys for Defendant.

Hearing Requested.

[fol. 54] Proof of Service (omitted in printing).

[fol. 55] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION
No. 21547-3

[Title omitted]

ORDER OVERRULING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT—November 8, 1963

Defendant was indicted for failure to pay his income taxes for the years 1956, 1957 and 1958, and he has filed "Supplemental Motion to Dismiss the Indictment", alleging that, "The indictment and each count is vague, indefinite and duplicitous; it fails adequately to inform the defendant of the charges against him," and follows the usual attack upon the indictment.

It also alleges that it is barred by the six year statute of limitations, and that:

> "The Commissioner acted illegally, unlawfully and in violation of his duty in issuing the complaint and summons based upon the affidavit of Special Agent Thompson; he failed to accord defendant a hearing as required under Rule 5(c), thereby failing to give defendant the opportunity to 'cross-examine witnesses against him' and present evidence for the purpose of determining whether there was in fact probable cause to believe he committed an offense; * * *."

[fol. 56] The same motion was before the court and overruled in a Memorandum and Order dated September 4, 1963, in which the provisions of the indictment were set out. In that order the court ruled upon all of the questions that have now been raised in defendant's Supplemental Motion.

Apparently the only ground for the filing of this motion is that a similar question involving the sufficiency of the Complaint was before the court in *U. S. A.* v. *Hyman Green-*

berg, on July 15, 1963, and reported in 320 F. 2d. 467 (9 Cir.) where a complaint was filed prior to the return of an indictment, obviously for the purpose of tolling the statute of limitations.

The complainant, a special agent of the Internal Revenue Service, made an affidavit which is in almost the exact language as that in the affidavit filed in the case now under consideration. That court held that the Commissioner could not determine for himself upon the complainant's affidavit, that probable cause existed for issuing the summons or warrant, and that the complaint so filed, did not toll the statute of limitations.

The question with which we are concerned here was before Judge Oliver of this court in *U. S. A.* v. *Black,* 216 F. S. 644, where the affidavit was identical with the one under consideration here. Judge Oliver in a well considered opinion, (written before U. S. A. vs Greenberg had been decided), overruled the defendant's Motion to Dismiss. [fol. 57] Since *Greenberg* and *Black,* supra, the identical question was before the Tenth Circuit in *Sanseverino* vs *U. S.,* 321 F. 2d. 714. That court said among other things:

> "The filing of such complaint, when made by the examining agent and affirmatively stating that the complaint is based upon his personal investigation, effectively tolls the statute under the proviso of Sec. 6531 which provides in part: * * *"

A hearing was conducted on defendant's first motion in this court. The agent who made the affidavit testified, and also the commissioner. The commissioner, after explaining what took place at the time the summons was issued, stated:

> "I read the Complaint and decided it was sufficient and signed my name to the summons."

It is very apparent from that that the commissioner made his own decision based upon the information that was given to him.

In his testimony, the agent gave the names of the partnerships, the records of which he examined. If an Internal Revenue agent may not be permitted to make an affidavit

based upon information obtained by him from an examination of a taxpayer's personal books and records, I do not see how he could ever make an affidavit sufficient to obtain a warrant.

I think it may truthfully be said in considering the definition of "personal knowledge" that knowledge obtained from an investigation of such personal records as the defendant's own bookkeeping records would imply personal knowledge if that is required in this type of case.

[fol. 58] Defendant seems to complain that he was not permitted the right to cross examine witnesses to determine whether or not there was any justification for issuing a complaint, or anything to show probable cause.

Following the issuance of the summons, the defendant was admitted to bail and thereafter was indicted. There was never any preliminary hearing, after the indictment was returned. There was no further reason to proceed under the complaint.

It is my conclusion that the information was sufficient upon which to base the issuance of the summons, and that its effect was to toll the statute of limitations.

Said Motion to Dismiss is therefore overruled.

Richard M. Duncan, Judge.

[fol. 59] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

No. 21547-3

[Title omitted]

Excerpt From Transcript of Proceedings—December 2, 1963

Be It Remembered, that on Monday, December 2, 1963, the above entitled cause came on regularly for trial before the Honorable Richard M. Duncan, Judge, at the Court House in Kansas City, Missouri.

APPEARANCES:

The Plaintiff was represented by Messrs. K. William O'Connor and Stephen Koplan, Special Attorneys, The Department of Justice, Washington, D. C.

The Defendant was present in person and represented by his Attorneys, Mr. Morris Shenker and Mr. E. Shapiro of the St. Louis Bar and Mr. James P. Quinn of the Kansas City Bar.

Whereupon, the following proceedings were had and entered of record:

The Court: Members of the jury, we are a little late this morning. The time set was ten o'clock. We are not going [fol. 60] to need the jury this morning. You may feel that we should have called you and let you know. It was impossible until a few minutes ago to determine that your services would not be needed. Bringing all of you back here seems an unusual expense and a waste of your time, but let me suggest to you that if there hadn't been some disposition made otherwise, the twelve of you who were called would have been here until about the 10th of January. So you may be thankful because this case would have taken anywhere from 2 to 3 weeks to try. You may be thankful that the 12 of you, whoever you might have been, will not have to serve. There will be a plea so you are going to be excused until 9:30 o'clock on Wednesday of this week. Report to the Clerk's office for service in Judge Gibson's court room.

Are you ready for United States versus Max Jaben?

Mr. O'Connor: The Government is ready.

The Court: Proceed, Mr. Shenker.

Mr. Shenker: In the case of United States versus Max Jaben, if it please the Court, the Court is aware of the fact that the defendant has heretofore filed various motions, among which were Motions to Dismiss Count I and alleging, among other things, that it was barred by the statute of limitations and the complaint and proceedings were insufficient to toll the statute, and that thereafter, if your Honor recalls, we filed a writ of prohibition or in the [fol. 61] alternative, a writ of certiorari, to the Court of Appeals seeking from that court an order declaring the

petition barred by the statute of limitations. That petition was denied a few days ago by the Eighth Circuit without prejudice, it being the sincere contention of counsel for the defendant as set out in the motions, that the petition indicated to be filed before the Court of Appeals is invalid and barred by the statute of limitations.

PERMISSION REQUESTED TO WITHDRAW PLEA OF NOT GUILTY AND TO ENTER PLEA OF NOLO CONTENDERE

The defendant is cognizant of the fact that a trial on the merits would entail considerable time and would be at great expense, not only to the Government, but to the defendant. There is no desire on the part of the defendant to contest the facts pertaining to Count I of the indictment, and we therefore ask leave of Court for permission to withdraw the former plea of not guilty that was entered for and on behalf of the defendant or by the defendant and respectfully ask the Court to accept in this instance as to Count I a plea of *nolo contendere* as to Count I as to the facts, and the defendant will offer no evidence to dispute or contradict the facts in this count and if the Court should enter a judgment of guilty on that plea of *nolo contendere* to Count I, that the defendant will then have an opportunity to have the question as to whether the said coun, is barred by the statute of limitations decided upon by the Eighth Circuit Court of Appeals or by the Supreme Court, and that the [fol. 62] plea of *nolo contendere* is not to preclude the defendant from taking an appeal on the issue at that time.

* * * * * * *

[fol. 63] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 64]

IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 21547

(Vio: Sec. 7201, T. 26, USC)

UNITED STATES OF AMERICA

v.

MAX JABEN

JUDGMENT AND COMMITMENT—January 7, 1964

On this 7th day of January, 1964 came the attorney for the government and the defendant appeared in person and by counsel. On Dec. 2, 1963 defendant, by leave of Court, withdrew his former plea of not guilty to Ct. 1 of the Indictment herein and tendered a plea of nolo contendere, which was accepted by the Court. Sentence deferred to this date pending pre-sentence investigation. Cts. 2 & 3 dismissed this day by leave of Court.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere to Ct. 1, entered herein on December 2, 1963, of the offense of wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue, a false and fraudulent income tax return for said calendar year, as charged in Count 1 of the Indictment filed herein; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of two (2) years; without costs.

Execution of All But four (4) months of said sentence of imprisonment is suspended and defendant is placed on probation for a period of twenty (20) months under the general conditions of probation adopted by the Court, and under the special conditions that during said period of probation the defendant shall refrain from gambling and from associating with persons known to be gamblers; conditions of probation will be communicated to defendant orally and in writing by the U. S. Probation Office.

It Is Adjudged that said period of probation is to commence upon expiration of sentence of imprisonment imposed herein.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Approved as to form: K. William O'Connor, Special U. S. Attorney.

R. M. Duncan, United States District Judge.

The Court recommends commitment to: None recommended.

(Signed) J. C. Truman, Clerk, By D. D. Daniel, Jr., Deputy Clerk.

[fol. 65] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

No. 21547-3

[Title omitted]

NOTICE OF APPEAL—Filed January 15, 1964

1. Name and Address of Appellant:

Max Jaben, 1208 West 85th Terrace, Kansas City, Missouri.

2. Name and Address of Appellant's Attorneys:

Morris A. Shenker, 408 Olive Street, St. Louis 2, Missouri

James Patrick Quinn, 1104 Oak Street, Kansas City 6, Missouri

3. Offense Charged:

Knowingly attempting to defeat and evade income taxes owing the United States by filing a false and fraudulent income tax return on April 16, 1957, for the calendar year 1956, in violation of 26 U. S. C., Section 7201.

4. Concise Statement of Judgment:

Judgment of January 7, 1964 convicting defendant on his plea of nolo contendere, and committing him to a term of two years, four months of which is to be spent in confinement and twenty months on probation, with special conditions imposed for probation.

5. Defendant is on bail.

Dated: January 15, 1964.

[fol. 66] I, the above-named defendant, hereby appeal to the United States Court of Appeals for the Eighth Circuit from the above-stated judgment.

Max Jaben, Appellant.

Morris A. Shenker, 408 Olive St., St. Louis 2, Mo.; James Patrick Quinn, 1100 Oak Street, Kansas City 6, Mo., Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 67] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 68]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,566

Appeal from the United States District Court for the Western District of Missouri.

MAX JABEN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

OPINION—June 16, 1964

Before Vogel, Matthes and Ridge, Circuit Judges.

MATTHES, Circuit Judge.

Max Jaben (hereinafter called "appellant") tendered a plea of nolo contendere to Count I of an indictment charging him with attempted evasion of income tax for the year 1956. The plea was accepted by the court (Judge

Duncan), and thereafter judgment of conviction was entered. The indictment was filed on May 17, 1963, more than six years after the offense alleged in Count I had been committed (April 16, 1957); however, the complaint upon which the summons was issued was filed on April 15, 1963, and within the limitation period.[1] This appeal pre- [fol. 69]- sents the sole question whether the offense is barred by the statute of limitations. In order to resolve this issue, we must scrutinize the complaint and determine whether it was sufficient to enable the United States Commissioner to ascertain that probable cause existed within the rationale and teachings of the Supreme Court in *Giordenello v. United States*, 357 U.S. 480 (1958), and consequently whether it was sufficient to toll the statute of limitations.

A summary of the facts, all undisputed, will serve to place the issue in proper perspective.

On April 15, 1963, David A. Thompson, Special Agent of the Internal Revenue Service, signed, swore to and filed the complaint around which the controversy is centered. Because of its importance, the complaint is set out in full in the margin under footnote 2.[2] The United States Com-

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[1] 26 U.S.C. § 6531, relating to periods of limitation on criminal prosecutions, provides in pertinent part that the period of limitation for prosecution for the offense of wilfully attempting in any manner to evade or defeat payment of any tax, is six years. This section further provides that, "Where a complaint is instituted before a commissioner of the United States within the period above limited [six years], the time shall be extended until the date which is 9 months after the date of the making of the complaint * * *."

Under the 1939 Code, § 3748(a), apparently applicable in *Zacher* v. *United States*, 8 Cir., 227 F.2d 219, 224-225 (1955), cert. denied, 350 U.S. 993 (1956), and *Burger* v. *United States*, 8 Cir., 262 F.2d 946, 953 (1959), cert. denied, 359 U.S. 990 (1959), the period of limitation was extended "until the discharge of the grand jury at its next session within the district." For analysis of 26 U.S.C. § 6531 and the amendment, see 1954 U.S. Code Cong. & Adm. News, pp. 4564, 5236.

[2] "The undersigned complainant, being duly sworn, states:

"That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said

[fol. 70] missioner determined from the complaint that probable cause existed and thereupon issued a summons directing appellant to appear before the Commissioner on May 15, 1963. On May 17, an indictment in three counts was filed in the United States District Court alleging that appellant had attempted to evade payment of income taxes for the years 1956, 1957 and 1958 by filing false and fraudulent income tax returns for those years on April 16, 1957, April 15, 1958, and July 13, 1959, respectively.

On July 2, appellant filed a motion to dismiss the indictment, specifically alleging as to Count I that the offense therein charged was barred by the six-year statute of limitations, and that the statute was not tolled by the complaint filed on April 15. After a hearing, the court on September 4 denied the motion. *United States* v. *Jaben*, W.D.Mo., 225 F.Supp. 47 (1963). Thereafter, on November 1, appellant filed a supplemental motion to dismiss the indictment—again most strenuously attacking Count I, apparently because of the Ninth Circuit's opinion in

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taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, in the Western District of Missouri, Max Jaben did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

(Signed) David A. Thompson
DAVID A. THOMPSON
Special Agent
Internal Revenue Service
Kansas City, Missouri."

United States v. *Greenberg*, 320 F.2d 467 (1963). This motion was denied on November 8. *United States* v. *Jaben*, W.D.Mo., 226 F.Supp. 757 (1963).

On December 2, the plea of nolo contendere to Count I of the indictment was tendered by appellant and accepted by the court. Counts II and III of the indictment were dismissed, and on January 7, 1964, judgment was entered [fol. 71] on appellant's plea. Appellant was sentenced to imprisonment for a term of two years, but execution of all but four months of the sentence was suspended, and appellant was placed on probation for twenty months. This appeal is from the judgment of conviction on the plea.

We note initially that the question whether the offense is barred, a question appropriately raised by the motions to dismiss, is not foreclosed by the plea of nolo contendere. Appellant has the right to appeal from the judgment entered on the plea and to secure an adjudication of the question by this court. *Melrose Distillers, Inc.* v. *United States*, 4 Cir., 258 F.2d 726, 727 (1958), affirmed, 359 U.S. 271 (1959). Compare also, *Lott* v. *United States*, 367 U.S. 421 (1961).

Appellant concedes that the complaint was filed within six years after the alleged offense was committed and recognizes that if the complaint is legally sufficient, the indictment, even though filed after the limitation period, is timely and supports the judgment of conviction. Conversely, the Government concedes that if the complaint is legally defective, the statute was not tolled by the filing thereof and the prosecution is barred. No other conclusion is permissible in view of 26 U.S.C. § 6531, and prior adjudications by this court. *Burger* v. *United States*, supra, 262 F.2d 946; *Zacher* v. *United States*, 227 F.2d 219.

Buttressed by the holding in *United States* v. *Greenberg*, supra, 320 F.2d 467, appellant's position, in summary, is that the challenged complaint is invalid on its face, in that it is vague, indefinite, is *pro forma*, and merely states the conclusion of the affiant; that it is based upon hearsay and no basis is alleged for crediting the hearsay; and that since no facts are alleged showing probable cause to believe that appellant committed the offense charged, the [fol. 72] issuance of the summons violated the probable

cause requirement of the Fourth Amendment to the United States Constitution and Rules 3 and 4, Fed. R. Crim. P.[3] Beyond cavil, *Greenberg*, supra, 320 F.2d 467, which struck down an almost identical complaint, supports appellant's position. However, that holding is not binding upon us, and with all due deference, we are not inclined—for what we regard to be impelling and cogent reasons—to follow that case.

Unquestionably, and as recognized by appellant and the Government, the controlling authority is *Giordenello v. United States*, supra, 357 U.S. 480. The parties differ, however, in their interpretation of the test which *Giordenello* established for determining whether the complaint satisfies the probable cause requirement.

It is well to have in mind that in *Giordenello* the pertinent part of the complaint read:

> "'The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.'" 357 U.S. at 481.

The crux of the holding in *Giordenello* on the issue before us is articulated as follows at pp. 485-486 of the opinion:

> "Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn [fol. 73] complaint (1) setting forth 'the essential facts

---

[3] Rule 3, Fed. R. Crim. P., provides: "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4 provides in pertinent part that if it appears from the complaint that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant shall issue; or upon the request of the attorney for the Government, a summons instead of a warrant shall issue.

constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it. . . .' The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that '. . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized,' of course applies to arrest as well as search warrants. See *Ex parte Burford*, 3 Cranch 448; *McGrain* v. *Daugherty*, 273 U.S. 135, 154-157. The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U.S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

"When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

[fol. 74] Unlike *Giordenello*, here the complainant (Agent Thompson) stated under oath that he had personally investigated the tax liability of appellant; he set forth the nature of that investigation and stated that based upon the investigation he had "personal knowledge" that appellant had committed the offense which formed the basis of Count I of the indictment. In our view, the complaint does "pass muster" because it does provide a basis for the Commissioner's determination of the existence of probable cause.

Complaints substantially identical to the one under consideration were held invulnerable to the same attack appellant advances by at least two other district courts, *United States* v. *Black*, W.D. Mo., 216 F.Supp. 645 (1963) (Judge Oliver), and *United States* v. *Scheetz*, S.D. Ind., 224 F.Supp. 789 (1963) (Chief Judge Steckler).

Additionally, the identical question was raised before the Tenth Circuit in *Sanseverino* v. *United States*, 321 F.2d 714 (1963).[4] There, the appellant had urged that, "The complaint was not sufficient to toll the statute for the further reason that it does not show the matters were in the personal knowledge of the affiant and no showing that testimony was taken." In response, the Government, after an extended discussion of *United States* v. *Freeman*, S.D. Ind., 165 F.Supp. 121 (1958), and *Giordenello* v. *United States*, supra, 357 U.S. 480, stated,

> "The complaint fully meets the test set forth in *Giordenello* in respect of complainant's *personal knowl-*
> [fol. 75] *edge* of the matters therein set forth, and in respect of the *sources for complainant's belief* that a crime had been committed."

---

[4] Appellant admits that the briefs in *Sanseverino* (provided to this Court by appellant) contain some discussion of the question before us. However, appellant discounts *Sanseverino's* applicability, claiming that there no challenge to the complaint was made in the trial court, and consequently the Tenth Circuit did not discuss it, apparently thinking the issue waived.

Although the complaint does not appear in the reported opinion in *Sanseverino*, a true copy of such complaint was filed with the district court here and appears as a part of the original files. The complaint is similar, although perhaps not quite as complete, as the one before us.

The Tenth Circuit, without reference to the arguments summarized above, held:

> "The filing of such complaint, when made by the examining agent and affirmatively stating that the complaint is based upon his personal investigation, effectively tolls the statute under the proviso of Section 6531. . . ." 321 F.2d at 715.

We are constrained to observe additionally that if *Giordenello* is to be accorded the broad meaning and application contended for by appellant, then the result could conceivably be the elimination entirely of the filing of complaints by agents of the Internal Revenue Service who have conducted an investigation of the liability of a taxpayer. As stated by Judge Duncan, supra, 226 F. Supp. at 758, "If an Internal Revenue agent may not be permitted to make an affidavit based upon information obtained by him from an examination of a taxpayer's personal books and records, . . . [we] do not see how he could ever make an affidavit sufficient to obtain a warrant." We do not believe such result was intended; certainly it would not be desirable, and is not necessary to protect the constitutional rights of the alleged offender.

The trial court properly held that the complaint tolled the statute of limitations. The judgment of conviction is

Affirmed.

[fol. 76] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17,566 September Term, 1963

MAX JABEN, Appellant,

vs.

UNITED STATES OF AMERICA.

JUDGMENT—June 16, 1964

Appeal from the United States District Court for the Western District of Missouri.

Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Max Jaben, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

Order entered in accordance with Opinion:

Robert C. Tucker, Clerk, U. S. Court of Appeals for the Eighth Circuit.

[fol. 77] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17566

[Title omitted]

ORDER DENYING PETITION OF APPELLANT FOR A REHEARING—July 9, 1964

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

Order entered at direction.

Robert C. Tucker, Clerk, U. S. Court of Appeals, 8th Circuit.

[fol. 78] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 79]

SUPREME COURT OF THE UNITED STATES

No. 347, October Term, 1964

MAX JABEN, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 19, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
AUG 3 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 347

MAX JABEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

MAX JABEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered June 16, 1964.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix, infra) is not yet reported. Two relevant opinions of the District Court are published, **United States v. Jaben**, 225 F. Supp. 47 (W. D. Mo. 1963); **United States v. Jaben**, 226 F. Supp. 757 (W. D. Mo. 1963).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 16, 1964, affirming petitioner's conviction entered on his plea of *nolo contendere* to a violation of Title 26, U. S. C., § 7201. Petitioner's motion for rehearing was denied on July 9, 1964. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

1. Do Rules 3 and 4 of the Federal Rules of Criminal Procedure, construed in light of the Fourth Amendment to the Federal Constitution, permit the Commissioner to issue a complaint and summons in a tax evasion case thereby tolling the six year statute of limitations, Title 26, U. S. C., § 6531, where such complaint and summons is issued solely on the basis of a form affidavit with blanks filled in, executed by a Special Agent of the Internal Revenue Service, adopted by the Justice Department for use in tax evasion cases, wherein *pro forma* the agent avers that he has personal knowledge that taxes were evaded by reason of his having interviewed unnamed persons allegedly doing business with the taxpayer "and having knowledge of said taxpayer's financial condition", and his having examined unspecified public and private documents "reflecting the said taxpayer's income"; where in addition to containing said *pro forma* allegations, there is no basis alleged for crediting the veracity of the unnamed persons and unspecified documents, and there is no basis averred for establishing which statements are based on the agent's personal knowledge and which are based on hearsay?

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. The Fourth Amendment to the Federal Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized."

2. Title 26, U. S. C., § 6531, provides in pertinent part, as follows:

> "No person shall be prosecuted, tried or punished for any of the various offenses arising under the Internal Revenue laws unless the indictment is found or the information is instituted within 3 years, next after commission of the offense, except that the period of limitation shall be 6 years . . . "
>
> "(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;"
>
> . . . . . .
>
> ". . . Where a complaint is instituted before a commissioner of the United States within the period above limited the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States . . ."

3. Rule 3 of the Federal Rules of Criminal Procedure provides:

> "Rule 3. The Complaint
>
> The complaint is a written statement of the essential facts constituting the offense charged. It shall

be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

4. Rule 4 of the Federal Rules of Criminal Procedure provides in pertinent part, as follows:

"Rule 4. Warrant or Summons upon Complaint

(a) **Issuance.** If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the Government a summons instead of a warrant shall issue. . . ."

STATEMENT.

Petitioner was indicted on a three count indictment; Count I of the indictment charges tax evasion for the year 1956 by the filing of a false return on April 16, 1957. The indictment was returned on May 17, 1963, more than six years after the return was alleged to have been filed (R. 1). By appropriate motions, appellant moved to dismiss Count I on the grounds that it was barred by the statute of limitations (R. 11, 95, 99). A hearing was held on August 6, 1963 (T. 3-42). The Court held that the complaint (R. 9-10) filed April 15, 1963 tolled the statute of limitations (R. 82, 111-114).

At the hearing on August 6, 1963, Lee E. Cisel, Commissioner for the Western District of Missouri at Kansas City, testified in behalf of appellant (T. 3-14). He testified that on April 15, 1963 he issued a summons for appellant based upon a complaint filed with him on that date (T. 3). The complaint reads as follows:

"The undersigned complainant, being duly sworn, states:

That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956, and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of said taxpayer's financial condition.

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, Max Jaben did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue of the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,569.99."

Mr. David Thompson, a Special Agent for the Internal Revenue Service accompanied by Mr. Featherstone of the Justice Department, came into Commissioner Cisel's office on April 15, 1963 with the complaint. He read the complaint which was signed by Thompson, found it sufficient

and signed his name to the summons. Thereafter, he certified a copy of the complaint and gave it to Mr. Thompson or Mr. Featherstone to be taken to the Marshal's office. That was all that took place at that time (T. 12-13). Thereafter, at the request of the United States Attorney, no further proceedings were conducted by the Commissioner (R. 7).

After all motions to dismiss were overruled, appellant applied to the Eighth Circuit for a writ of prohibition, or in the alternative for mandamus or certiorari, to prevent further proceedings on Count I. This petition was overruled without prejudice to the bringing of the instant appeal, Jaben v. Duncan, Misc. No. 226 (8th Cir., 1963). (The Court's order is not published.)

Thereafter, on December 2, 1963, through his counsel, appellant entered his plea of *nolo contendere* to the facts of Count I of the indictment, specifically reserving the right to appeal on the question of whether or not the count is barred by the statute of limitations (R. 125-126). The district court accepted appellant's plea and on January 7, 1964, sentenced appellant to a term of two years, four months of which sentence was to be served; appellant was placed on probation for the remaining twenty months (R. 135). The two remaining counts were dismissed by the government. On January 15, 1964, appellant appealed to the Eighth Circuit from the judgment of conviction and foregoing sentence (R. 136).

In the Eighth Circuit, appellant urged that the only issue was whether or not the complaint based on the affidavit satisfied the requirements of Rules 3 and 4 of the Federal Rules of Criminal Procedure construed in light of the Fourth Amendment to the Federal Constitution; if the complaint were valid the statute of limitations, Title 26, U. S. C., § 6531, was tolled and the judgment should be affirmed: otherwise, if the complaint were invalid the

statute was not tolled and the judgment should be reversed. Both the Government and the Eighth Circuit accepted this premise (App. 4). Accordingly, the only issue in the case was the validity of the complaint.

Appellant relied primarily on the case of **Greenberg v. United States**, 320 F. 2d 467 (9th Cir., 1963), a case involving a virtually identical complaint which was declared invalid and incapable of tolling the statute of limitations by the Ninth Circuit based on this Court's decision in **Giordenello v. United States**, 357 U. S. 480 (1958). Appellant cited this Court's language in **Giordenello**, relied upon by the Ninth Circuit:

> "The protection afforded by these Rules [Rules 3 and 4, Fed. Rules Crim. Proc.] when they are viewed against their constitutioned background, is that the inferences from the facts which lead to the complaint '* * *' be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' * * *. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.
>
> "When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with

personal knowledge of the matters contained therein; it does not set forth any other sufficient basis upon which a finding of probable cause could be made * * * 375 U. S. at p. 486 (Emphasis supplied)."

It was urged that the instant complaint similarly failed to "pass muster," because the complaint on its face established the absence of personal knowledge and there were no facts alleged which would demonstrate personal knowledge.

Appellant also cited to the Circuit Court of Appeals this Court's decision in **Jones v. United States**, 362 U. S. 257 (1960), urging that since **Giordenello** applied the same criteria to arrest warrants as to search warrants the case was directly in point. Appellant further urged that since the affidavit herein was based on hearsay, i. e., information obtained from unnamed persons and unspecified documents, and that since there was no basis for crediting the hearsay the affidavit was invalid in light of **Jones**, supra.

Finally, appellant relied upon the case of **Ventresca v. United States**, 324 F. 2d 864 (1st Cir. 1963), certiorari granted, U. S. (1964). It was urged that although the affidavit herein alleged the complainant had personal knowledge, on its face the affidavit showed that at least some of his information was hearsay, and therefore the affidavit was insufficient for failing to designate which statements were based on hearsay and which were based on personal knowledge.

The Government relied principally on the cases of **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963); **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963); and **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963), all of which cases held that form complaints virtually identical to that involved in the instant

case were sufficient to toll the statute of limitations. The **Black** case is worth special mention for the reason that it arose out of the same district as the instant case; accordingly, the same commissioner, Mr. Cisel, was involved.

The Eighth Circuit and the government made no effort to distinguish **Greenberg**, supra. The Court held that "beyond cavil" the **Greenberg** case supported appellant's position (App. 5). Rejecting the Ninth Circuit's opinion and relying on its own interpretation of **Giordenello**, supra, however, the Court held the complaint sufficient, relying upon **Sanseverino**, supra, **Black**, supra and **Scheetz**, supra. Thus, this case is one where there is a clear and undeniable conflict between the decision in the instant case and the decision of the Ninth Circuit in **Greenberg**, supra.

In the motion for rehearing, petitioner called the Circuit Court's attention to the case of **Aguilar v. Texas**, 375 U. S. 812 (1964), which had been decided the day prior to the Eighth Circuit's opinion. In **Aguilar**, this Court reaffirmed that the same standards of probable cause apply to arrest warrants as well as to search warrants and that **Jones** as well as **Giordenello** must be considered by the court. Petitioner also pointed out that this Court articulated the requirement that the commissioner be informed of the "underlying circumstances" from which the officer concluded the informant was "credible" or his information "reliable." It was urged, therefore, that as here the Commissioner was looking at a form affidavit almost identical to that he had already seen in **United States v. Black**, supra, he could not possibly be informed of the "underlying circumstances;" therefore, the affidavit was insufficient in light of **Aguilar**, **Jones** and **Giordenello**. The motion for rehearing was denied on July 9, 1964, without opinion.

REASONS FOR GRANTING THE WRIT.

1. The Government uses the form complaint involved herein in many tax evasion cases, and accordingly, the conflict of authorities should be resolved not only to avoid the anomaly of one man's freedom depending upon whether he is tried in the Ninth Circuit as opposed to the Eighth or Tenth, but also to resolve a question which will surely arise again in other circuits.

As pointed out previously, there is a clear and undeniable conflict between the decision herein and the decision in **Greenberg**, supra. We think it is important to resolve this conflict because the government makes frequent use of the complaint herein in tax evasion cases.

The Department of Justice has long adhered to the use of *pro forma* complaints in tax cases. Earlier forms were sometimes held invalid **United States v. Langsdale**, 115 F. Supp. 489 (W. D. Mo. 1953) (a decision by Judge Duncan who coincidentally presided in the instant case); **United States v. Freeman**, 165 F. Supp. 121 (D. C. S. D. Ind. 1958). Other decisions upheld the form complaint. **United States v. DeHardit**, 120 F. Supp. 110 (E. D. Va.), affirmed 224 F. 2d 673 (4th Cir. 1955). This Court's decision in **Giordenello**, supra, caused the Justice Department to abandon its older form in favor of the form employed in the instant case, and in **Greenberg**, supra, **Black**, supra, **Scheetz**, supra and **Sanseverino**, supra (Gov. Br. 18). From the above cases, it is evident that the form complaint herein is in use in the Seventh, Eighth, Ninth and Tenth Circuits. We have no personal knowledge that the same form is in use in the other circuits (although this seems probable) and accordingly, we call upon the Government in their reply brief to inform this Court of the exact nature and extent of the usage of this

form in tax evasion cases throughout the country. We suspect that the Government's brief will disclose that the form is in general use throughout the country, and is used in almost all cases where a complaint is filed in an attempt to toll the statute of limitations.

It is difficult to understand why with a six year statute of limitations the Government insists on waiting until almost the last day (and sometimes until the last minute of the last day) before instituting criminal proceedings. It has been our experience, however, and the experience of other practitioners, that more often than not the Government does wait until the last minute to file a complaint in a tax case. See, e. g., **Burger v. United States**, 262 F. 2d 946 (8th Cir. 1959); **Zacher v. United States**, 227 F. 2d 219 (8th Cir. 1955).

We tried unavailingly to challenge the Government's dilatory tactics in tax cases as a deprivation of the right to a speedy trial. **Foley v. United States**, 290 F. 2d 562 (8th Cir.), cert. denied, 368 U. S. 888 (1961). That such delay is almost a universal practice by the Government is amply demonstrated by **Greenberg**, supra, **Black**, supra, **Scheetz**, supra, **Sanseverino**, supra, and the instant case.

The foregoing inevitably points to the conclusion that the question which has already arisen in the Seventh, Eighth, Ninth and Tenth Circuit with a conflict between the Ninth Circuit on the one hand and the Eighth and Tenth on the other, will certainly arise again in other circuits. To avoid confusion in the law engendered by conflicts in decisions among the circuits, this Court has traditionally granted certiorari. In view of the importance of the question, its immediacy and universal application, it would seem incumbent that the law be settled.

Furthermore, in view of the abundance of recent cases turning upon the question involved here, the question is ripe for decision at this time.

2. The use by the Government of a form complaint as a "short cut" around the requirements of the Fourth Amendment raises serious questions in the administration of justice.

The form complaint used by the Government herein is as follows:

"The undersigned complainant, being duly sworn, states:

"That he is a Special Agent for the Internal Revenue Service, and, in the performance of the duties imposed on him by law, he conducted an investigation of the Federal income tax liability of (name of taxpayer) for the calendar year ..... by examining the said taxpayer's tax return for the calendar year ..... and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons, having knowledge of the said taxpayer's financial condition."

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the ..... day of ....., 19.., at (city), (State), in the District of (State), (name of taxpayer) did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year ....., by filing and causing to be filed with the District Director of Internal Revenue for the District of ....., (city), (state), at (city), (state), a false and fraudulent income tax return, wherein he stated his taxable income for the calendar year ..... was (income shown on tax return) and the amount due and owing for thereon was the sum of (amount of tax due as shown on return), when in fact, his taxable income

for the calendar year was the sum of ..... upon which said taxable income he owed to the United States of America an income tax of .....

(Signed) .....

Special Agent, Internal Revenue Service

.....

(City) (State)

It is clear from the foregoing form that all blanks, save one, can be filled by obtaining the information directly from the taxpayer's tax return at the office of the Internal Revenue Service. The remaining blank is the one wherein the amount of the true taxable income, according to the Special Agent, is filled in. Thus, the whole affidavit boils down to the Special Agent's unsupported conclusion that the taxpayer's actual income, as opposed to his reported income, was a certain number of dollars.[1] And this conclusion is the only basis on which the Commissioner could base his finding of probable cause.

It is, to say the least, difficult (and we think impossible) to square the usage of form complaints with the require-

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[1] Actually, the Special Agent's conclusion that the true taxable income is a certain amount is meaningless. It is universally held that the Government is not required to prove that the true taxable income is that alleged in the indictment. It need only prove that the actual income was substantially in excess of that reported and that, therefore, a substantial amount of taxes was evaded. See, e.g., *Leeby v. United States*, 192 F. 2d 331, 334 (8th Cir. 1951); *United States v. Johnson*, 319 U. S. 503 (1943). Thus, the effect of the affidavit would not be altered if instead of stating the amount of actual income the affidavit read:

> ". . . wherein he stated that his taxable income for the year ..... was ....., and that the amount due and owing thereon was the sum of ....., when in fact his taxable income for the said calendar was [substantially in excess of the amount reported] and upon said taxable income he owed to the United States of America an income tax [substantially in excess of the amount of .....]"

With this slight modification, the blanks could be filled in using only the records on file within the Internal Revenue Service without changing the legal effect of the affidavit.

ment of **Jones**, supra, that there be substantial basis alleged in the affidavit for crediting the information supplied by unnamed persons. Similarly, the usage of form complaints does not satisfy the requirements of **Aguilar**, supra, that the magistrate be informed of the "underlying circumstances" from which the officer concluded these persons were reliable;" and finally, this form complaint could not satisfy the purpose of a complaint, as set out in **Giordenello**, loc. cit., supra:

> "The purpose of the complaint . . . is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists."

It is difficult to see how we could say with the above form complaint that the "inferences from the facts which [led] to the complaint . . . [were] drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Granted that the purpose of the complaint is to supply the commissioner with facts from which he could draw the inference of probable cause, a form complaint would seem defeating of this purpose. The Government has drafted a form which is so universal in its application that it is probably literally true even when viewed in light of the myriad possibilities of tax evasion. By being so universally applicable, it is robbed of its sole function—it does not supply facts from which a commissioner can find probable cause.

Furthermore, the implications stemming from the sanctioned use of form affidavit are staggering. If a form complaint is appropriate with respect to complaint, it would be appropriate with respect to search warrants. Certainly, if the Government could reduce the multitude of fact situations to generalized forms (which we think it

will admit it is attempting to do), the situations where a person goes free because the "constable blundered" would be reduced. But, what would happen to the Fourth Amendment? We think it would be reduced to a game of finding and filling in the appropriate form. Further, the more universal the applicability of the form, the less likely it is to supply the necessary facts to the commissioner.

The instant case is a good example of how form complaints can be abused. The Special Agent was asked what he meant by "private records reflecting the said taxpayer's income". He showed a total lack of comprehension to the term used in the complaint sworn to by him (T. 16-18). Yet, the Commissioner by mere examination of the complaint found it sufficient (T. 12). If certiorari were granted, we would contend that the filing of a form complaint with the blanks filled in, coupled with the "rubber stamp" approval of the Commissioner, could not possibly satisfy the Fourth Amendment. In any event, there is a serious question raised as to whether justice can be administered by rote.

3. **At the previous term this Court decided a case involving an affidavit for a search warrant, Aguilar v. Texas, 375 U. S. 812 (1964); the Court has granted certiorari in the case of Ventresca v. United States, 324 F. 2d 864 (1st Cir. 1963), a case relied upon by appellant in the Eighth Circuit; since the instant case can be disposed of on the same basis as the Ventresca case; and since the instant case involves a complaint rather than a search warrant, a decision herein will serve nicely to round out the law in an area in which this Court has presently shown a great interest.**

This Court, subsequent to the date of the opinion by the Eighth Circuit herein, granted certiorari in the case

of **Ventresca v. United States**, 324 F. 2d 864 (1st Cir. 1963) certiorari granted, U. S., a case strongly relied upon by appellant in the Eighth Circuit. The question upon which this Court granted certiorari is the question of whether when the statements in an affidavit are based in part on personal knowledge and in part on hearsay, whether the affidavit must clearly show which statements are based on personal knowledge and which are based on hearsay. It was urged unavailingly in the Eighth Circuit that once the affidavit claimed personal knowledge whereas the remainder of the affidavit showed that at least in part it was based on hearsay, there being no delineation between the hearsay and the personal knowledge, the complaint was invalid in light of **Ventresca**, supra. It is submitted that in view of the fact that this Court thought the question to be of sufficient importance to justify certiorari in **Ventresca**, supra, it is also important enough to justify certiorari herein, especially in view of the conflict of the decisions of the Circuits on the validity of the complaint herein.

In addition to granting certiorari in **Ventresca**, supra, at the October, 1963, term, this Court decided the case of **Aguilar v. Texas**, 375 U. S. 812 (1964), building upon the line of cases defining the requirements for search warrants and complaints, culminating with **Jones**, supra, and **Giordenello**, supra. In addition, this Court has granted certiorari in **Stanford v. Texas**, certiorari granted, U. S., which also involves the validity of a search warrant. We think a decision in the instant case, which involves the validity of complaint rather than a search warrant, especially in view of the conflict among the circuits, would serve nicely to round out the law in this area.

CONCLUSION.

For the reasons stated hereinabove, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 17,566.

Max Jaben, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[June 16, 1964.]

Before Vogel, Matthes and Ridge, Circuit Judges.

Matthes, Circuit Judge.

Max Jaben (hereinafter called "appellant") tendered a plea of nolo contendere to Count I of an indictment charging him with attempted evasion of income tax for the year 1956. The plea was accepted by the court (Judge Duncan), and thereafter judgment of conviction was entered. The indictment was filed on May 17, 1963, more than six years after the offense alleged in Count I had been committed (April 16, 1957); however, the complaint upon which the summons was issued was filed on April 15,

1963, and within the limitation period.[1] This appeal presents the sole question whether the offense is barred by the statute of limitations. In order to resolve this issue, we must scrutinize the complaint and determine whether it was sufficient to enable the United States Commissioner to ascertain that probable cause existed within the rationale and teachings of the Supreme Court in **Giordenello v. United States**, 357 U. S. 480 (1958), and consequently whether it was sufficient to toll the statute of limitations.

A summary of the facts, all undisputed, will serve to place the issue in proper perspective.

On April 15, 1963, David A. Thompson, Special Agent of the Internal Revenue Service, signed, swore to and filed the complaint around which the controversy is centered. Because of its importance, the complaint is set out in full in the margin under footnote 2.[2] The United States Com-

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[1] 26 U. S. C., § 6531, relating to periods of limitation on criminal prosecutions, provides in pertinent part that the period of limitation for prosecution for the offense of wilfully attempting in any manner to evade or defeat payment of any tax, is six years. This section further provides that, "Where a complaint is instituted before a commissioner of the United States within the period above limited [six years], the time shall be extended until the date which is 9 months after the date of the making of the complaint * * *."

Under the 1939 Code, § 3748 (a), apparently applicable in *Zacher v. United States*, 8 Cir., 227 F. 2d 219, 224-225 (1955), cert. denied, 350 U. S. 993 (1956), and *Burger v. United States*, 8 Cir., 262 F. 2d 946, 953 (1959), cert. denied, 359 U. S. 990 (1959), the period of limitation was extended "until the discharge of the grand jury at its next session within the district." For analysis of 26 U. S. C., § 6531 and the amendment, see 1954 U. S. Code, Cong. & Adm. News, pp. 4564, 5236.

[2] "The undersigned complainant, being duly sworn, states:

"That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did bus-

missioner determined from the complaint that probable cause existed and thereupon issued a summons directing appellant to appear before the Commissioner on May 15, 1963. On May 17, an indictment in three counts was filed in the United States District Court alleging that appellant had attempted to evade payment of income taxes for the years 1956, 1957 and 1958 by filing false and fraudulent income tax returns for those years on April 16, 1957, April 15, 1958, and July 13, 1959, respectively.

On July 2, appellant filed a motion to dismiss the indictment, specifically alleging as to Count I that the offense therein charged was barred by the six-year statute of limitations, and that the statute was not tolled by the complaint filed on April 15. After a hearing, the court on September 4 denied the motion. **United States v. Jaben**, W. D. Mo., 225 F. Supp. 47 (1963). Thereafter, on November 1, appellant filed a supplemental motion to dismiss the indictment—again most strenuously attacking Count I, apparently because of the Ninth Circuit's opinion in

---

iness; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, in the Western District of Missouri, Max Jaben did unlawfuly and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

(Signed) David A. Thompson
DAVID A. THOMPSON,
Special Agent,
Internal Revenue Service,
Kansas City, Missouri."

United States v. Greenberg, 320 F. 2d 467 (1963). This motion was denied on November 8. **United States v. Jaben**, W. D. Mo., 226 F. Supp. 757 (1963).

On December 2, the plea of nolo contendere to Count I of the indictment was tendered by appellant and accepted by the court. Counts II and III of the indictment were dismissed, and on January 7, 1964, judgment was entered on appellant's plea. Appellant was sentenced to imprisonment for a term of two years, but execution of all but four months of the sentence was suspended, and appellant was placed on probation for twenty months. This appeal is from the judgment of conviction on the plea.

We note initially that the question whether the offense is barred, a question appropriately raised by the motions to dismiss, is not foreclosed by the plea of nolo contendere. Appellant has the right to appeal from the judgment entered on the plea and to secure an adjudication of the question by this court. **Melrose Distillers, Inc. v. United States**, 4 Cir., 258 F. 2d 726, 727 (1958), affirmed 359 U. S. 271 (1959). Compare also, **Lott v. United States**, 367 U. S. 421 (1961).

Appellant concedes that the complaint was filed within six years after the alleged offense was committed and recognizes that if the complaint is legally sufficient the indictment, even though filed after the limitation period, is timely and supports the judgment of conviction. Conversely, the Government concedes that if the complaint is legally defective, the statute was not tolled by the filing thereof and the prosecution is barred. No other conclusion is permissible in view of 26 U. S. C., § 6531, and prior adjudications by this court. **Burger v. United States**, supra, 262 F. 2d 946; **Zacher v. United States**, 227 F. 2d 219.

Buttressed by the holding in **United States v. Greenberg**, supra, 320 F. 2d 467, appellant's position, in summary, is

that the challenged complaint is invalid on its face, in that it is vague, indefinite, is *pro forma*, and merely states the conclusion of the affiant; that it is based upon hearsay and no basis is alleged for crediting the hearsay; and that since no facts are alleged showing probable cause to believe that appellant committed the offense charged, the issuance of the summons violated the probable cause requirement of the Fourth Amendment to the United States Constitution and Rules 3 and 4, Fed. R. Crim. P.[3]

Beyond cavil, **Greenberg**, supra, 320 F. 2d 467, which struck down an almost identical complaint, supports appellant's position. However, that holding is not binding upon us, and with all due deference, we are not inclined—for what we regard to be impelling and cogent reasons—to follow that case.

Unquestionably, and as recognized by appellant and the Government, the controlling authority is **Giordenello v. United States**, supra, 357 U. S. 480. The parties differ, however, in their interpretation of the test which **Giordenello** established for determining whether the complaint satisfies the probable cause requirement.

It is well to have in mind that in **Giordenello** the pertinent part of the complaint read:

> "'The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas,

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[3] Rule 3, Fed. R. Crim. P., provides: "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4 provides in pertinent part that if it appears from the complaint that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant shall issue; or upon the request of the attorney for the Government, a summons instead of a warrant shall issue.

Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.' " 357 U. S. at 481.

The crux of the holding in **Giordenello** on the issue before us is articulated as follows at pp. 485-486 of the opinion:

"Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant has committed it. . . . ' The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that '. . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized,' of course applies to arrest as well as search warrants. See **Ex parte Burford**, 3 Cranch. 448; **McGrain v. Daugherty**, 273 U. S. 135, 154-157. The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' **Johnson v. United States**, 333 U. S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's

mere conclusion that the person whose arrest is sought has committed a crime.

"When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

Unlike **Giordenello**, here the complainant (Agent Thompson) stated under oath that he had personally investigated the tax liability of appellant; he set forth the nature of that investigation and stated that based upon the investigation he had "personal knowledge" that appellant had committed the offense which formed the basis of Count I of the indictment. In our view, the complaint does "pass muster" because it does provide a basis for the Commissioner's determination of the existence of probable cause.

Complaints substantially identical to the one under consideration were held invulnerable to the same attack appellant advances by at least two other district courts, **United States v. Black**, W. D. Mo., 216 F. Supp. 645 (1963) (Judge Oliver), and **United States v. Scheetz**, S. D. Ind., 224 F. Supp. 789 (1963) (Chief Judge Steckler).

Additionally, the identical question was raised before the Tenth Circuit in **Sanseverino v. United States**, 321 F. 2d 714 (1963).[4] There, the appellant had urged that,

[4] Appellant admits that the briefs in *Sanseverino* (provided to this Court by appellant) contain some discussion of the question before us. However, appellant discounts *Sanseverino's* applicability claiming that there no challenge to the complaint was made in the

"The complaint was not sufficient to toll the statute for the further reason that it does not show the matters were in the personal knowledge of the affiant and no showing that testimony was taken." In response, the Government, after an extended discussion of **United States v. Freeman**, S. D. Ind., 165 F. Supp. 121 (1958), and **Giordenello v. United States**, supra, 357 U. S. 480, stated:

> "The complaint fully meets the test set forth in **Giordenello** in respect of complainant's **personal knowledge** of the matters therein set forth, and in respect of the **sources for complainant's belief** that a crime had been committed."

The Tenth Circuit, without reference to the arguments summarized above, held:

> "The filing of such complaint, when made by the examining agent and affirmatively stating that the complaint is based upon his personal investigation, effectively tolls the statute under the proviso of Section 6531. . . ." 321 F. 2d at 715.

We are constrained to observe additionally that if **Giordenello** is to be accorded the broad meaning and application contended for by appellant, then the result could conceivably be the elimination entirely of the filing of complaints by agents of the Internal Revenue Service who have conducted an investigation of the liability of a taxpayer. As stated by Judge Duncan, supra, 226 F. Supp. at 758, "If an Internal Revenue agent may not be permitted to make an affidavit based upon information obtained by him from an examination of a taxpayer's per-

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trial court, and consequently the Tenth Circuit did not discuss it, apparently thinking the issue waived.

Although the complaint does not appear in the reported opinion in *Sansoverino*, a true copy of such complaint was filed with the district court here and appears as a part of the original files. The complaint is similar, although perhaps not quite as complete, as the one before us.

sonal books and records, . . . [we] do not see how he could ever make an affidavit sufficient to obtain a warrant." We do not believe such result was intended; certainly it would not be desirable, and is not necessary to protect the constitutional rights of the alleged offender.

The trial court properly held that the complaint tolled the statute of limitations. The judgment of conviction is

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

(Filed Jun. 16, 1964, Robert C. Tucker, Clerk.)

United States Court of Appeals
For the Eighth Circuit.

No. 17,566. September Term, 1963.

Max Jaben, Appellant,

vs.

United States of America.

Appeal From the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Max Jaben, do surrender himself to the custody of the United States Marshal for the Western District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

June 16, 1964.

Order entered in accordance with Opinion:—

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit.

No. 17,566. September Term, 1963.

Max Jaben,	Appellant,	Appeal from the United States District Court for the Western District of Missouri.
vs.		
United States of America.		

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 9, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 347

MAX JABEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The question presented is whether the court below properly held that the instant complaint before the United States Commissioner, charging petitioner with wilfully attempting to evade his taxes for the year 1956, was sufficient to toll the running of the statute of limitations on this offense. The decision, we believe, is correct, and all other courts, with one exception, have held virtually identical complaints to be sufficient. *Sanseverino* v. *United States*, 321 F. 2d 714, 715 (C.A. 10th); *United States* v. *Black*, 216 F.

Supp. 645, 648 (W.D. Mo.); *United States* v. *Scheetz*, 224 F. Supp. 789 (S.D. Ind.). However, in view of the conflict with the holding of the Court of Appeals for the Ninth Circuit in *United States* v. *Greenberg*, 320 F. 2d 467, the government does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

OCTOBER, 1964.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 347.

MAX JABEN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 347.

MAX JABEN,
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v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 333 F. 2d 535 (8th Cir. 1964). Two district court opinions are reported at 225 F. Supp. 47 (W. D. Mo. 1963) and 226 F. Supp. 757 (W. D. Mo. 1963). An order of the Eighth Circuit overruling a petition for prohibition or in the alternative for mandamus or certiorari is reported as **Jaben v. Duncan**, 324 F. 2d 956 (8th Cir. 1963).

JURISDICTION.

The judgment of the Eighth Circuit Court of Appeals was entered on June 16, 1964 (R. 63). A timely motion for rehearing was denied on July 9, 1964 (R. 64). Petitioner filed his petition for certiorari on August 3, 1964. Certiorari was granted on October 19, 1964. The jurisdiction of this Court to review the decision was invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

1. Do Rules 3 and 4 of the Federal Rules of Criminal Procedure, construed in light of the Fourth Amendment to the Federal Constitution, permit the Commissioner to issue a complaint and summons in a tax evasion case thereby tolling the six year statute of limitations, Title 26. U. S. C., § 6531, where such complaint and summons is issued solely on the basis of a form affidavit with blanks filled in; executed by a Special Agent of the Internal Revenue Service, adopted by the Justice Department for use in tax evasion cases, wherein *pro forma* the agent avers that he has personal knowledge that taxes were evaded by reason of his having interviewed unnamed persons allegedly doing business with the taxpayer "and having knowledge of said taxpayer's financial condition", and his having examined unspecified public and private documents "reflecting the said taxpayer's income"; where in addition to containing said *pro forma* allegations, there is no basis alleged for crediting the veracity of the unnamed persons and unspecified documents, and there is no basis averred for establishing which statements are based on the agent's personal knowledge and which are based on hearsay?

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED.

1. The Fourth Amendment to the Federal Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized."

2. 68 A. Stat. 815, Title 26 U. S. C. § 6531, provides in pertinent part, as follows:

> "No person shall be prosecuted, tried or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after commission of the offense, except that the period of limitation shall be 6 years—
>
> * * * * * * * * *
>
> "(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;"
>
> * * * * * * * * *
>
> ". . . Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States . . ."

3. Rule 3 of the Federal Rules of Criminal Procedure provides:

"**Rule 3. The Complaint**

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

4. Rule 4 of the Federal Rules of Criminal Procedure provides in pertinent part, as follows:

"**Rule 4. Warrant or Summons Upon Complaint**

(a) **Issuance.** If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the Government a summons instead of a warrant shall issue. . . ."

STATEMENT.

Petitioner was indicted on a three count indictment; Count I of the indictment charges tax evasion for the year 1956 by the filing of a false return on April 16, 1957. The indictment was returned on May 17, 1963, more than six years after the return was alleged to have been filed (R. 3-5). By appropriate motions, petitioner moved to dismiss Count I on the grounds that it was barred by the statute of limitations (R. 44). A hearing was held on August 6, 1963 (R. 9). The Court held that the complaint (R. 1) filed April 15, 1963, tolled the statute of limitations (R. 47-49).

At the hearing on August 6, 1963, Lee E. Cisel, Commissioner for the Western District of Missouri at Kansas City, testified in behalf of appellant (R. 10-17). He testified that on April 15, 1963, he issued a summons for appellant based upon a complaint filed with him on that date (R. 11). The complaint reads as follows:

> "The undersigned complainant, being duly sworn, states:
>
> "That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956, and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of said taxpayer's financial condition.
>
> "That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri,

Max Jaben did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue of the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,569.99" (R. 1).

Mr. David Thompson, a Special Agent for the Internal Revenue Service, accompanied by Mr. Featherstone of the Justice Department, came into Commissioner Cisel's office on April 15, 1963, with the complaint. He read the complaint which was signed by Thompson, found it sufficient and signed his name to the summons. Thereafter, he certified a copy of the complaint and gave it to Mr. Thompson or Mr. Featherstone to be taken to the Marshal's office. That was all that took place at that time (R. 16). Thereafter, at the request of the United States Attorney, no further proceedings were conducted by the Commissioner (R. 7-8, 13).

After all motions to dismiss were overruled, petitioner applied to the Eighth Circuit for a writ of prohibition, or in the alternative for mandamus or certiorari, to prevent further proceedings on Count I. This petition was overruled without prejudice to the bringing of the instant appeal, Jaben v. Duncan, 324 F. 2d 956 (8th Cir., 1963).

Thereafter, on December 2, 1963, through his counsel, appellant entered his plea of *nolo contendere* to the facts of Count I of the indictment, specifically reserving the right to appeal on the question of whether or not the

count is barred by the statute of limitations (R. 51). The district court accepted appellant's plea and on January 7, 1964, sentenced appellant to a term of two years, four months of which sentence was to be served; appellant was placed on probation for the remaining twenty months (R. 52-53). The two remaining counts were dismissed by the government. On January 15, 1964, petitioner appealed to the Eighth Circuit from the judgment of conviction and foregoing sentence (R. 54-55).

In the Eighth Circuit, petitioner urged that the only issue was whether or not the complaint based on the affidavit satisfied the requirements of Rules 3 and 4 of the Federal Rules of Criminal Procedure construed in light of the Fourth Amendment to the Federal Constitution; if the complaint were valid the statute of limitations, Title 26, U. S. C. § 6531, was tolled and the judgment should be affirmed; otherwise if the complaint were invalid the statute was not tolled and the judgment should be reversed. Both the Government and the Eighth Circuit accepted this premise (R. 58). Accordingly, the only issue in the case was the validity of the complaint.

Petitioner relied primarily on the case of **Greenberg v. United States**, 320 F. 2d 467 (9th Cir. 1963), a case involving a virtually identical complaint which was declared invalid and incapable of tolling the statute of limitations by the Ninth Circuit based on this Court's decision in **Giordenello v. United States**, 357 U. S. 480, 486, 78 S. Ct. 1245, 1250, 92 L. Ed. 436 (1958).

It was urged that the instant complaint failed to "pass muster," because the complaint on its face established the absence of personal knowledge and there were no facts alleged which would demonstrate personal knowledge.

Petitioner also cited to the Circuit Court of Appeals this Court's decision in **Jones v. United States**, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), urging that since

Giordenello applied the same criteria to arrest warrants as to search warrants the case was directly in point. Petitioner further urged that since the affidavit herein was based on hearsay, i. e., information obtained from unnamed persons and unspecified documents, and that since there was no basis for crediting the hearsay the affidavit was invalid in light of **Jones**, supra.

Finally, petitioner relied upon the case of **Ventresca v. United States**, 324 F. 2d 864 (1st Cir. 1963), certiorari granted 377 U. S. 989 (1964). It was urged that although the affidavit herein alleged the complainant had personal knowledge, on its face the affidavit showed that at least some of his information was hearsay, and therefore the affidavit was insufficient for failing to designate which statements were based on hearsay and which were based on personal knowledge.

The Government relied principally on the cases of **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963); **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963); and **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963), all of which cases held that form complaints virtually identical to that involved in the instant case were sufficient to toll the statute of limitations. (The **Black** case is worth special mention for the reason that it arose out of the same district as the instant case; accordingly, the same commissioner, Mr. Cisel, was involved.)

Rejecting the Ninth Circuit's opinion and relying on its own interpretation of **Giordenello**, supra, the Eighth Circuit held the complaint sufficient, relying upon **Sanseverino**, supra, **Black**, supra, and **Scheetz**, supra. Thus, this case is one where there is a clear and undeniable conflict between the decision in the instant case and the decision of the Ninth Circuit in **Greenberg**, supra.

In the motion for rehearing, petitioner called the Circuit Court's attention to the case of **Aguilar v. Texas**,

378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), which had been decided the day prior to the Eighth Circuit's opinion. In **Aguilar**, this Court reaffirmed that the same standards of probable cause apply to arrest warrants as well as to search warrants and that **Jones** as well as **Giordenello** must be considered by the court. Petitioner also pointed out that this Court articulated the requirement that the commissioner be informed of the "underlying circumstances" from the officer concluded the informant was "credible" or his information "reliable." It was urged, therefore, that as here the Commissioner was looking at a form affidavit almost identical to that he had already seen in **United States v. Black**, supra, he could not possibly be informed of the "underlying circumstances;" therefore, the affidavit was insufficient in light of **Aguilar**, **Jones** and **Giordenello**. The motion for rehearing was denied on July 9, 1964, without opinion.

ARGUMENT.

Petitioner Max Jaben entered a plea of *nolo contendere* to Count I of a three count indictment[1] charging him with tax evasion in violation of 68A Stat. 851, Title 26, U. S. C., § 7201. Jaben was charged in this count with tax evasion for the year 1956 by filing a false income tax return on April 16, 1957. The indictment herein was returned on May 17, 1963 (R. 3). Thus, more than six years elapsed between the date the offense is alleged to have occurred and the date the indictment was returned. However, a complaint was filed within the six year period on April 15, 1963 (R. 1-2).

Jaben urged in the District Court and in the Court of Appeals that the indictment was not timely filed and that therefore prosecution was barred on Count I by virtue of 68A Stat. 815, Title 26, U. S. C., § 6531, having been brought more than six years after the offense is alleged to have occurred. It was his position below that although a complaint was filed within the six year period, it did not toll the statute of limitations because it was invalid. The Government conceded below that the plea of *nolo contendere* did not foreclose this appeal and that if the complaint was defective, the indictment was invalid. Petitioner in turn conceded that if the complaint were valid, the indictment was timely brought (R. 58). Accordingly, the only issue before this Court is the validity of the complaint.

1. The complaint is invalid under the Fourth Amendment.

The complaint herein is a form complaint with the blanks filled in. Passing for the moment the implications

[1] The remaining two counts were dismissed by the Government (R. 58).

connected with the use of forms to satisfy the Fourth Amendment, we submit that the complaint filed below is invalid on its face. The complaint executed by Special Agent Thompson avers that he conducted an investigation of Jaben's tax liability for the year 1956 "by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of said taxpayer's financial condition." The complaint then concludes "[t]hat based on the aforesaid investigation, the complainant has *personal knowledge* that on or about the 16th day of April, 1957 . . . Max Jaben [evaded income taxes by reporting an income of $17,665.31 when his true income was $49,001.76]." (R. 1-2). In short, the agent claims "personal knowledge" based on unspecified information obtained from unnamed persons and unspecified documents which reflect the taxpayer's income.

An evaluation of the validity of the complaint must begin with this Court's decision in **Giordenello v. United States**, 357 U. S. 480, 78 S. Ct. 1245, 4 L. Ed. 2d 1503 (1958), which enunciated the requirements of a valid complaint in terms of Rules 3 and 4 of the Federal Rules of Criminal Procedure construed in light of the Fourth Amendment, as follows:

> "Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth 'the essential facts constituting the offense charged,' and (2) showing 'that there is probable cause to believe that [such] an offense has been committed and that the defendant committed it . . .' The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirma-

tion, and particularly describing * * * the persons or things to be seized * * *,' of course applies to arrest as well as search warrants. See Ex Parte Burford, 3 Cranch 448, 2 L. Ed. 495; McGrain v. Daugherty, 273 U. S. 135, 154-157, 47 S. Ct. 319, 323, 71 L. Ed. 580. The protection afforded by these Rules when they are viewed against their constitutioned background, is that the inferences from the facts which lead to the complaint '* * * be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' * * *. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

"When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. *The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not set forth any other sufficient basis upon which a finding of probable cause could be made* * * * 357 U. S. at 486, 78 S. Ct. at 1250 (Emphasis Supplied)."

The agent's claim herein that he had "personal knowledge" of tax evasion is evidently inserted into the complaint in response to the above italicized portion of the **Giordenello** opinion. And, the Eighth Circuit relied

heavily on this allegation in sustaining the complaint (R. 61).

We do not understand the above italicized portion of the opinion in **Giordenello** to hold that a mere naked allegation of "personal knowledge" is sufficient to validate a complaint. Otherwise, a complaint wherein the agent merely stated, "I have personal knowledge that the taxpayer committed tax evasion" would be valid. A complaint framed solely in such terms, however, would be patently invalid, for then we would have "the inferences from the facts which [led] to the complaint . . . drawn . . . by [an] officer engaged in the often competitive enterprise of ferreting out crime" rather than by "a neutral and detached magistrate", contrary to the teachings of **Giordenello.** See also, **Johnson v. United States,** 333 U. S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948); **Aguilar v. Texas,** 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 723 (1964).

Besides, although the Special Agent herein stated that he had "personal knowledge", he stated he had "personal knowledge" based on his investigation which consisted of examination of unnamed persons and unspecified documents. It is submitted that "personal knowledge" based on information derived from others is not "personal knowledge" at all, and therefore this allegation stands on no different footing than the statement in **Nathanson v. United States,** 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159 (1933), that the affiant "has cause to suspect and does believe" or the statement in **Aguilar v. Texas,** 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), that the affiants "do believe". By itself, these allegations do not support the issuance of a warrant. Something more is necessary, a "statement of adequate supporting facts". **Nathanson,** supra, 290 U. S. at 46, 54 S. Ct. at 13. This is what **Giordenello v. United States,** 357 U. S. 480, 486, 78 S. Ct. 1245, 1250, 2 L. Ed. 2d 1503 (1958), held. See

discussion in **Aguilar v. Texas**, supra, 378 U. S. at 112, 84 S. Ct. at 1509.

The question of the validity of the complaint herein, then, is whether it contained a "statement of adequate supporting facts." **Nathanson**, loc. cit., supra. The statement supporting the Agent's conclusions, as indicated, avers that he interviewed unnamed third persons and examined unspecified documents. Clearly the Agent's conclusions are based on hearsay. Of course, an affidavit may be based on hearsay information and need not reflect personal observations of the affiant so long as there is a "substantial basis for crediting the hearsay", **Jones v. United States**, 362 U. S. 257, 269, 80 S. Ct. 725, 735, 4 L. Ed. 2d 697 (1960). But, where there is no "substantial basis for crediting the hearsay", the statement of supporting facts is inadequate and the complaint must be declared invalid. Cf. **Beck v. Ohio**, ... U. S. ..., 85 S. Ct. 223, ... L. Ed. 2d ... (1964). Then, what basis is there for crediting the hearsay upon which the Agent relied? He allegedly relied on two types of hearsay information, (1) "public and private records reflecting the said taxpayer's income", and (2) persons "having knowledge of the said taxpayer's financial condition" and "with whom the said taxpayer did business" (R. 1). But what kind of documents were involved? Who prepared them? Were these persons credible? And what information did they contain? Also, with whom did the taxpayer do business? What kind of business? What did they know about his financial affairs? Just what did they tell the agent? Were they credible people? The affidavit is silent on these questions. Without the answers to at least some of these questions, we submit there was no "substantial basis for crediting the hearsay". After all, "the magistrate must be informed of some of the underlying circumstances." **Aguilar v. United States**, supra, 378 U. S. at 114, 84 S. Ct. at 1514, 12 L. Ed. 2d 723.

Although the complainant alleged he had "personal knowledge", as indicated previously, his so-called "personal knowledge" is not personal knowledge since it is based on hearsay. Even if he can be credited by this allegation with some personal knowledge, his conclusion that Jaben committed the crime of tax evasion is still based in part on hearsay. It is therefore submitted that the complaint is invalid nevertheless because the affidavit does not state which facts are based on hearsay and which are based on personal knowledge. This question is now before the Court in **Ventresca v. United States**, 324 F. 2d 864 (1st Cir.), cert. granted 377 U. S. 989, 84 S. Ct. 1910 (1964). It is submitted that the question was decided correctly in the First Circuit. In any event, in the instant case, we cannot know of any specific fact within the knowledge of the agent. For all we knew, then, his conclusion is based entirely on hearsay, and for the reasons above indicated, there is no "substantial basis for crediting the hearsay."

2. **A form complaint cannot satisfy the Fourth Amendment.**

A magistrate, here a Commissioner, "must perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." **Aguilar v. Texas**, supra, 378 U. S. at 111, 84 S. Ct. at 1512. The Commissioner here, however, was looking at a form complaint with the blanks filled in, and we submit that by issuing the complaint based solely on the form affidavit supplied him by Agent Thompson, he acted merely as a "rubber stamp" and not as a "neutral and detached magistrate."

The form complaint used by the government herein is as follows:

> "The undersigned complainant, being duly sworn, states:
>
> "That he is a Special Agent for the Internal Revenue Service, and, in the performance of the duties

imposed on him by law, he conducted an investigation of the Federal income tax liability of . . . (name of taxpayer) . . . for the calendar year . . . by examining the said taxpayer's tax return for the calendar year . . . and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons, having knowledge of the said taxpayer's financial condition."

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the .... day of ....., 19.., at ..... (City), ... (State), ... in the district of ..... (State), ..., (name of taxpayer) . . . did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year ....., by filing and causing to be filed with the District Director of Internal Revenue for the District of ....., (City), ... (State), ..., at ..... (City), ... (State), . . . a false and fraudulent income tax return, wherein he stated his taxable income for the calendar year ..... was ..... (income shown on tax return) . . . and the amount due and owing for thereon was the sum of ..... (amount of tax due as shown on return), . . . when in fact, his taxable income for the calendar year was the sum of ..... upon which said taxable income he owed to the United States of America an income tax of .....

(Signed) .....
Special Agent, Internal Revenue Service,
.....
(City) (State)

It is clear from the foregoing that all blanks, save one, can be filled in by obtaining the information directly from the taxpayer's tax return at the office of the Internal Revenue Service. The remaining blank is the one wherein the amount of the true taxable income, according to the Special Agent, is filled in. Thus, the whole affidavit boils down to the Special Agent's unsupported conclusion that the taxpayer's actual income, as opposed to his reported income, was a certain number of dollars.[2] And this conclusion is the only basis on which the Commissioner could base his finding of probable cause.

It is, to say the least, difficult (and we think impossible) to square the usage of form complaints with the requirement of **Jones**, supra, 362 U. S. at 269, 80 S. Ct. at 735, that there be substantial basis alleged in the affidavit for crediting the information supplied by unnamed persons. Similarly, the usage of form complaints does not satisfy the requirements of **Aguilar**, supra, 378 U. S. at 114, 84 S. Ct. at 1514, that the magistrate be informed of the "underlying circumstances" from which the officer concluded these persons were reliable; and finally, this

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[2] Actually, the Special Agent's conclusion that the true taxable income is a certain amount is meaningless. It is universally held that the Government is not required to prove that the true taxable income is that alleged in the indictment. It need only prove that the actual income was substantially in excess of that reported and that, therefore, a substantial amount of taxes was evaded. See, *United States v. Johnson*, 319 U. S. 503, 63 S. Ct. 1233, 87 L. Ed. 1546 (1943). Thus, the effect of the affidavit would not be altered if instead of stating the amount of actual income the affidavit read:

> ". . . wherein he stated that his taxable income for the year . . . was . . ., and that the amount due and owing thereon was the sum of . . ., when in fact his taxable income for the said calendar was [substantially in excess of the amount reported] and upon said taxable income he owed to the United States of America an income tax [substantially in excess of the amount of . . .]."

With this slight modification, the blanks could be filled in using only the records on file within the Internal Revenue Service without changing the legal effect of the affidavit.

form complaint could not satisfy the purpose of a complaint, as set out in **Giordenello**, supra, 357 U. S. at 486, 78 S. Ct. at 1250:

> "The purpose of the complaint . . . is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists."

It is difficult to see how we could say with the above form complaint that the "inferences from the facts which [led] to the complaint . . . [were] drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

If the purpose of the complaint is to supply the commissioner with facts from which he could draw the inference of probable cause, a form complaint is defeating of this purpose. The Government has drafted a form which is so universal in its application that it is literally true even when viewed in light of the myriad possibilities of tax evasion. By being so universally applicable, it is robbed of its sole function—it does not supply "facts" from which a commissioner can find probable cause.

Furthermore, the implications stemming from the sanctioned use of form affidavits are staggering. If a form complaint is appropriate with respect to a complaint, it would be appropriate with respect to search warrants. Certainly, if the Government could reduce the multitude of fact situations to generalized forms (which we think it will admit it is attempting to do), the situations where a person goes free because the "constable blundered" would be reduced. But, what would happen to the Fourth Amendment? We think it would be reduced to a game of finding and filling in the appropriate form. Further, the more universal the applicability of the form, the less likely it is to supply the necessary facts to the commissioner.

Besides, the possibilities of abuse inherent in the sanctioned use of universal form complaints are amply demonstrated by the testimony of Agent Thompson adduced in the instant case. It is clear that he did not even understand let alone prepare the affidavit he signed under oath before the Commissioner (R. 20). Yet the Commissioner based on this affidavit found probable cause existed, in the same way the same Commissioner found that the very same affidavit was sufficient to allege probable cause in another case, **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963).

The government has long adhered to the use of form complaints in its efforts to toll the statute of limitations. Some courts held earlier forms invalid. See e. g., **United States v. Freeman**, 165 F. Supp. 47 (S. D. Ind. 1958); **United States v. Langsdale**, 115 F. Supp. 489 (W. D. Mo. 1953). Other courts held the form invalid, **United States v. DeHardit**, 120 F. Supp. 110, affirmed 224 F. 2d 673 (4th Cir. 1955). Evidently, after this Court's decision in **Giordenello v. United States**, 357 U. S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958), the government abandoned its earlier forms in favor of that employed in the instant case. (See Gov. Br. in 8th Cir., p. 18, fn. 4.) That this form is in use in the Seventh, Eighth, Ninth Circuits is amply demonstrated by the cases of **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963); **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963); **United States v. Greenberg**, 320 F. 2d 467 (9th Cir. 1963); and **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963). We call upon the government in its brief to inform the Court of the nature and extent of the usage of this form throughout the country.

It is difficult to understand why with a six year statute of limitations the government insists on waiting until the last minute before filing a complaint in an effort to toll

the statute of limitations. That such delay is universal is amply demonstrated by the foregoing cases.

If the government investigated diligently, the six years granted them by Congress would be sufficient and it would not have to resort to form affidavits to circumvent the will of Congress and short circuit the Fourth Amendment. On the other hand, the danger to the individual inherent in the "rubber stamp" application of the Fourth Amendment is manifest. Accordingly, it is submitted that this Court should in this case strike down short cut applications of the Fourth Amendment, such as employed here.

CONCLUSION.

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 347

MAX JABEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court (R. 38–44, 47–49) are reported at 225 F. Supp. 47 and 226 F. Supp. 757. The opinion of the court of appeals (R. 55–62) is reported at 333 F. 2d 535.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1964 (R. 63), and a petition for rehearing was denied on July 9, 1964 (R. 64). The petition for a writ of certiorari was filed on August 3, 1964, and was granted on October 19, 1964 (R. 64). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the complaint filed by a special agent of the Internal Revenue Service charging petitioner with attempted evasion of income taxes in violation of Section 7201 of the Internal Revenue Code was sufficient to extend the statute of limitations on the prosecution of such offenses.

STATUTE AND RULES INVOLVED

Section 6531 of the Internal Revenue Code of 1954 provides in pertinent part:

> SEC. 6531. PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.
>
> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—
>
> * * * * * *
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
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> * * * * * *
>
> * * * Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. * * *

Rule 3 of the Federal Rules of Criminal Procedure provides:

> Rule 3. THE COMPLAINT.
>
> The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4(a) of the Federal Rules of Criminal Procedure provides:

> Rule 4. WARRANT OR SUMMONS UPON COMPLAINT.
>
> (a) ISSUANCE. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

STATEMENT

On April 16, 1957, petitioner filed his 1956 income tax return with the District Director of Internal Revenue at Kansas City, Missouri, and declared a tax liability of $6,017.32 (R. 38). On April 15, 1963, the following sworn complaint was filed before the United States Commissioner by David A. Thompson, a special agent of the Internal Revenue Service, for

the sole purpose of tolling the statute of limitations for the year 1956[1] (R. 1–2):

COMPLAINT FOR VIOLATION OF SECTION 7201 INTERNAL REVENUE CODE OF 1954—FILED APRIL 15, 1963

Before Lee E. Cisel, United States Commissioner, Western District of Missouri.

The undersigned complainant, being duly sworn, states:

That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, in the Western District of Missouri, Max Jaben did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the District of Kansas City, Missouri, at Kansas City,

[1] See Section 6531 of the Internal Revenue Code of 1954, p. 2 above.

Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

DAVID A. THOMPSON,
Special Agent, Internal Revenue Service,
Kansas City, Missouri.

Sworn to before me and subscribed in my presence, this 15th day of April, 1963.

LEE E. CISEL,
United States Commissioner.

[SEAL]

The Commissioner determined from the complaint that there was probable cause to believe that petitioner had committed the offense charged, and thereupon issued a summons directing petitioner to appear before him at a preliminary hearing on May 15, 1963, to answer to the complaint (R. 2–3, 7–8). On May 11, 1963, the preliminary hearing on the complaint was continued to May 22, 1963, at the request of the United States Attorney and without objection by petitioner (R. 12, 13). The preliminary hearing was never held since, on May 17, 1963, the grand jury returned a three-count indictment charging petitioner with willfully attempting to evade his taxes for the years 1956, 1957, and 1958, in violation of Sections 7201 and 7206(1) of the Internal Revenue Code of 1954 (R. 3–5).

On May 24, 1963, petitioner entered a plea of not

guilty to all counts of the indictment. Thereafter, on July 2, 1963, he filed a motion to dismiss count one, pertaining to the year 1956, on the ground that the complaint did not show probable cause to believe that he had violated Section 7201 and hence was insufficient to toll the statute of limitations for that year (R. 40–41, 57). On August 6, 1963, at a hearing on this motion, Commissioner Cisel testified that he issued the summons solely on the basis of the sworn complaint submitted by the special agent. Defense counsel then called special agent Thompson as a witness. At the inception of the direct examination, government counsel objected to any interrogation of the agent with respect to the issue of probable cause on the ground that that question "must be determined from the complaint itself" (R. 18). After a brief colloquy, the court at first reserved decision on the government's objection (R. 19), but later during the hearing ruled that the only question "is whether or not the Commissioner was justified at the time the information was taken before him in issuing and signing the summons" (R. 24).[2]

On September 4, 1963, the court denied petitioner's motion, and held that the complaint was sufficient

[2] Defense counsel was permitted to question special agent Thompson as to some aspects of his examination (R. 18–27). The agent testified that his investigation of petitioner's tax liability commenced in April 1961 and continued until January 1963 (R. 25–26); that the "private records" which he examined consisted of the records of various partnerships which were reflected in petitioner's return, including the Baltimore Avenue Association, the Holmes Hotel, Main Street Investment Company, 1122 Penn Building Company, and the Midwest Exchange (R. 20–21); and that it took him a long time to write his report (R. 25–27).

to toll the statute of limitations (R. 41–42, 44). Thereafter, on November 1, 1963, petitioner renewed his motion to dismiss count one of the indictment (R. 44) on the ground that the Ninth Circuit, in *United States* v. *Greenberg*, 320 F. 2d 467, had held a virtually identical complaint to be insufficient to toll the statute. On November 8, 1963, the district court, declining to follow the *Greenberg* opinion, again denied petitioner's motion (R. 47–48). On November 26, 1963, the Eighth Circuit denied a petition for a writ of prohibition and/or mandamus to review the holding of the district court. *Jaben* v. *Duncan*, 324 F. 2d 956.

On December 2, 1963, the date set for trial, petitioner withdrew his plea of not guilty to count one of the indictment, and entered a plea of *nolo contendere* which was accepted by the court (R. 49–51). Counts two and three of the indictment were thereafter dismissed at the request of the government, and, on January 7, 1964, petitioner was sentenced to imprisonment for a period of two years (R. 52–53). Execution of all but four months of the sentence was suspended, and petitioner was placed on probation for twenty months (R. 53).

The court of appeals affirmed the conviction (R. 55–62). Rejecting the view expressed in *United States* v. *Greenberg*, it held that the complaint satisfied the Fourth Amendment standard of probable cause as applied in *Giordenello* v. *United States*, 357 U.S. 480, since (R. 61):

> * * * the complainant (Agent Thompson) stated under oath that he had personally investigated the tax liability of appellant; he set forth the

nature of that investigation and stated that based upon the investigation he had "personal knowledge" that appellant had committed the offense which formed the basis of Count I of the indictment. In our view, the complaint does "pass muster" because it does provide a basis for the Commissioner's determination of the existence of probable cause.

ARGUMENT

Introduction and Summary

Section 6531 of the Internal Revenue Code of 1954 establishes a six-year period of limitations for the offense of willfully attempting in any manner to evade or defeat any tax. It further provides that "[w]here a complaint is instituted before a commissioner of the United States within the period above limited," the period shall be extended for "9 months after the date of the making of the complaint before the commissioner." The complaint in the instant case, charging attempted evasion of taxes for 1956, was filed within the six-year statutory period. The indictment was returned within nine months from the filing of the complaint. The sole question presented is whether the complaint was effective for the purpose of tolling the statute of limitations.

The complaint alleged that the affiant was a special agent of the Internal Revenue Service; that he had personal knowledge that petitioner had evaded specific amounts of taxable income and taxes; and that he had obtained this information from public and private records and from persons who knew petitioner's financial condition and had business dealings with

him. Moreover, the Commissioner could properly consider that complaints of this kind are not initiated by a single agent but are reviewed at higher levels of the Internal Revenue Service and in the Department of Justice. This Court has held that in the case of a search pursuant to a warrant, it need only appear that the magistrate had "substantial basis" for ruling that there was probable cause. *Jones* v. *United States,* 362 U.S. 257, 270–271; *Aguilar* v. *Texas,* 378 U.S. 108, 110–111. In light of the allegations and the relevant procedures, we believe that the complaint provided substantial basis for the Commissioner's finding of probable cause even if the Fourth Amendment's standard of probable cause is applied.

Moreover, here there was no invasion of privacy whatever. Petitioner was neither arrested nor searched. The sole purpose of the complaint was to toll the statute of limitations. Thus, in our view, the Fourth Amendment is in no way involved.

The proper standard must be determined by looking to Section 6531 and the Federal Rules of Criminal Procedure. Section 6531 provides that the period of limitations is tolled upon institution by the government of a complaint. The requirements for a complaint are set forth in Rule 3, which says only that the complaint must state "the essential facts constituting the offense charged" and that it "be made upon oath." While Rule 4(a) requires a showing of probable cause for the Commissioner to issue an arrest warrant (or, arguably, a summons), there is no such requirement for a complaint having the entirely discrete purpose of tolling a statute of limita-

tions. Since the basic right of privacy is not involved, the only interest petitioner can claim is that of not having the time extended merely at the whim of the government. We believe that this interest is protected if, as here, the complaint states the essential elements of the offense under oath. In fact, the complaint here shows that the government had conducted a thorough investigation and had specific information indicating that petitioner had evaded taxes.

THE COMPLAINT FILED BY THE SPECIAL AGENT WAS SUFFICIENT TO EXTEND THE STATUTE OF LIMITATIONS UNDER SECTION 6531 OF THE INTERNAL REVENUE CODE

A. A COMPLAINT WHICH STATES THE ESSENTIAL FACTS CONSTITUTING A TAX OFFENSE UPON A CAREFUL INVESTIGATION BY THE AGENT MAKING THE COMPLAINT SATISFIES SECTION 6531, WHETHER OR NOT IT SHOWS "PROBABLE CAUSE" FOR AN ARREST OR SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT

Section 6531 provides in part:

> Where a complaint is instituted before a commissioner of the United States within the period above limited [*i.e.*, 6 years], the time shall be extended until the date which is 9 months after the date of the making of the complaint before the Commissioner of the United States.

The complaint to which this section refers is obviously the complaint defined in Rule 3 of the Rules of Criminal Procedure:

> The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

The complaint filed by the special agent in the present case is a sufficient complaint within the meaning of Rule 3. It charges an offense, sets forth the basis of the accusation, and is sworn to by the agent. It states that the agent had conducted an investigation of petitioner's income tax liability for 1956 by examining petitioner's tax returns for that and other years; by interviewing third parties with whom petitioner did business or who had knowledge of his financial condition; and by consulting public and private records reflecting petitioner's income (R. 1). The complaint further states that, based on this investigation, the agent had personal knowledge that petitioner had filed a fraudulent tax return for 1956 by declaring that his taxable income for that year was $17,665.31 and the tax due was $6,017.32, when in fact his taxable income was $40,001.76 and the tax due was $14,562.99 (R. 1–2).[3] In sum, the complaint shows under oath, that the agent has personal knowledge, based on an extensive investigation, which permitted a statement in specific figures as to petitioner's actual tax liability.

In determining whether Congress required more, it is proper to take into account the familiar, well-established procedures followed before filing complaints in income tax cases. Investigation of frauds on the revenue are conducted by special agents of the Internal Revenue Service who have had training in either accounting or law. Within the Internal Revenue Serv-

[3] The indictment which was later returned, charging petitioner with willfully attempting to evade taxes for 1956, gave the same figures as to the taxpayer's true income and tax sworn to by the agent in his complaint (R. 3–4).

ice, the findings and recommendations of the special agent making the investigation are reviewed successively by his Group Chief, the Chief of the Intelligence Division in the District Director's Office, the Office of the Assistant Regional Commissioner-Intelligence, and, finally, by the Enforcement Division in the Office of Regional Counsel. If the ultimate recommendation of the Internal Revenue Service, acting through the Regional Counsel, is that the case should be prosecuted, the entire file is then sent to the Department of Justice, where the case is again thoroughly reviewed—by an attorney in the Criminal Section of the Tax Division, by the Chief of the Criminal Section, and, on occasion, by the Assistant Attorney General in charge of the Tax Division. At several steps in this review procedure, both in the Internal Revenue Service and in the Department of Justice, a taxpayer, if he wishes, is normally afforded a conference so that he may present any explanation, facts, or evidence which he desires to have considered. It is only after this lengthy review is completed that the case is referred for prosecution to the United States Attorney, to whom taxpayers often again present their explanations in a final effort to dissuade prosecution. Balter, *Tax Fraud and Evasion,* 3.13–3.31 (3d ed., 1963); see *Sullivan* v. *United States,* 348 U.S. 170.

The decision to file a complaint is not made by the special agent, but by the Tax Division of the Department of Justice. It is only after receiving express instructions from the Justice Department that the special agent files the complaint. Thus, unlike the situation presented by the usual criminal case, the

complaint in an income tax case represents the outcome of an elaborate investigating and review procedure.

Significantly, Section 6531 provides that the mere filing of "a complaint" extends the statute of limitations. There is no reference to "probable cause," no reference to a determination by the Commissioner or the issuance of a warrant or summons.[4] All that is required is "a complaint." *United States* v. *Clark*, 122 F. Supp. 150, 151 (N.D. Ala.).

To be sure, for some purposes a complaint is insufficient unless it makes a showing of "probable cause" consistent with the requirements of the Fourth Amendment. Rule 4(a) authorizes the issuance of a warrant for the arrest of the defendant "if it appears from the complaint that there is probable cause to believe" that the defendant has committed an offense. The "probable cause" there required is indubitably the same showing that must be made to justify a warrant or search and seizure under the Fourth Amendment. *Giordenello* v. *United States*, 357 U.S. 480, 485; *Aguilar* v. *Texas*, 378 U.S. 108, 112, note 3. But the requirements of the Fourth Amendment should not be read into Rule 3 for all purposes and certainly should not be carried over into the bare requirement of a complaint filed solely for the purpose of tolling the statute of limitations under Section 6531. Complaints serve different functions. One

[4] Of course, there must be some notice of the complaint, formal or informal, to the defendant—a requirement clearly met in this case. In cases such as *United States* v. *Rully*, 136 F. Supp. 881 (D. Conn.), and *United States* v. *Montgomery*, 158 F. Supp. 267 (E.D. Pa.), the complaint was found invalid because the defendant had not been properly notified.

is to give the defendant notice of the charge against him and to bring the matter within the jurisdiction of the court. A complaint may be sufficient for this purpose even though it would not justify the issuance of a warrant because it failed to set forth probable cause within the meaning of the Fourth Amendment. *Byrnes* v. *United States*, 327 F. 2d 825 (C.A. 9), certiorari denied, 377 U.S. 970. Another purpose is the issuance of a summons. Whether the showing that must be made to justify the issuance of a summons requiring the defendant merely to respond and setting the stage for a hearing before the Commissioner is the same as would be required for an arrest warrant need not be determined in the present case. Still another purpose of a complaint—that which is relevant here—is the tolling of the statute of limitations. Whether a complaint is sufficient to issue a warrant, to issue a summons, or to toll the statute of limitations must be determined with reference to the particular function it performs and not by the ritualistic application of formulas.

A complaint tolling the statute of limitations serves an altogether different function than one laying the foundation for an arrest; its consequences and the procedure underlying it are altogether different. Unlike the police officer, who often must act quickly to seize the fruits of the crime, the special agent in an income tax case conducts an exhaustive investigation; the crime of tax evasion, if it has taken place, has long since occurred. And, unlike the police officer, who necessarily must operate with little supervision in the "often competitive enterprise of

ferreting out crime" (*Johnson* v. *United States*, 333 U.S. 10, 14), the special agent's findings and recommendations must, as we have seen, pass through several levels of review in the Internal Revenue Service and the Department of Justice before referral to the United States Attorney for prosecution.

As a result, the special agent's investigation of a complicated tax evasion case, together with the review procedure which later follows, is a lengthy and time-consuming process. The process is particularly lengthy where, as here (R. 42), "the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, [since] the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt." *Holland* v. *United States*, 348 U.S. 121, 135.

Although the government has six years within which to return an indictment for tax evasion, occasionally this period proves insufficient, albeit the government has gathered considerable evidence of tax errors. Extra time may be required because a grand jury is not in session in the judicial district; because there is a need for further investigation of such matters as the taxpayer's explanation; or because the taxpayer wishes an opportunity to discuss his contentions with either the Department of Justice or the United States Attorney. In these infrequent situations,[5] the government invokes the complaint procedure provided by Congress in Section 6331 of the Code.

[5] Of the 803 criminal income tax cases now pending, only 23 were instituted in whole or in part by complaint in order to extend the statute of limitations.

The effect of the complaint is only to charge a crime, to give the defendant notice, and to toll the statute of limitations. Except where there is a risk that the taxpayer will flee the jurisdiction, the government has no interest in causing his arrest. If it sought an arrest, probable cause would have to be shown; but petitioner was never arrested. His home was not searched. And there was no seizure of his property. It is true that the complaint sought the issuance of a summons and a summons was issued. However, petitioner was never required to respond to it. In any event, it is immaterial whether the complaint was sufficient to justify the issuance of the summons. The sole question here is whether the complaint was sufficient to give petitioner notice of the crime with which he was charged and to toll the statute of limitations. Since the filing of the complaint did not possibly involve any invasion of petitioner's privacy, the answer must be that the Fourth Amendment does not apply.

Moreover, there is no reason for adopting the Fourth Amendment's standard of probable cause. The only interest petitioner can assert is that of not being charged with crime or having the statute of limitations extended for a few months at the mere whim of the government. This interest is adequately protected if

the complaint shows that, on the basis of a full investigation, the government has specific information that a person has evaded taxes.

Not only does the complaint procedure lack any element of invasion of privacy; it has a salutary purpose which would be impaired by subjecting complaints in tax evasion cases to the strict standards applied in cases arising under the Fourth Amendment. This Court has recognized that the difficulties in detecting tax evasion cases and in developing criminal tax cases—especially where, as here, the net worth method must be employed—create problems that "cannot be met merely by the application of general rules." *Holland* v. *United States, supra,* 348 U.S. at 129. Indeed, the Congressional recognition of the circumstances peculiar to an evasion case is reflected in the extraordinary complaint procedure provided in Section 6531 of the Internal Revenue Code—to our knowledge, the only such provision which exists in the federal law. An unduly restrictive attitude in interpreting such complaints would tend to defeat the objectives of the complaint procedure—"the dual purpose of affording all parties further opportunity for conferences and reviews, perhaps even at the level of the United States Attorney, while protecting the Government from the lapse of time to prosecute, if that be the ultimate decision." Balter, *supra,* 12.8. Moreover, the complaint procedure allows the taxpayer, if he has not yet presented his views either in a mem-

orandum or at a conference, an opportunity to do so before indictment.[6]

Granting that the government could set forth in the complaint further details of its investigation, we submit that such pleading would be inappropriate in the great majority of criminal tax cases. Where, as in most instances, hundreds of records have been examined and scores of witnesses questioned, it is impractical to draft a complaint detailing the records examined, the witnesses interviewed, and the information thereby obtained. Apart from the administrative burden, the result would be to require a full bill of particulars before the case was even ready for the grand jury. And the Commissioner would still have to rely primarily upon the special agent's expert interpretation and evaluation of the complex information presented.

In distinguishing the cases defining "probable cause" for the purposes of the Fourth Amendment, we do not suggest that the period of limitations should be extended by the filing of any piece of paper denominated a complaint. There must be a written statement of the essential facts constituting the offense charged, within the meaning of Rule 3. It must be made upon oath and therefore must be the consequence of conscientious investigation. There would seem to be no occasion for reading the words "probable cause" into Rule 3 and Section 6531 for those words are better used as a term of art applicable to arrests or

[6] A taxpayer in an evasion case is often a person of otherwise good reputation whose paramount interest is in preventing an indictment and the accompanying notoriety.

searches and seizures under the Fourth Amendment. We suggest further that even if the term "probable cause" were read into Rule 3 and Section 6531, the result should be the same. The character of the showing required to constitute "probable cause" will vary with the purpose for which the showing is made, and what is sufficient to justify a formal charge having only the consequence of extending the statute is less than what is required to justify the invasions of liberty and privacy attendant upon arrest or search and seizure.

In short, we believe that the Fourth Amendment is not applicable and that the Court should not adopt its standards in this discrete situation. The interest of the taxpayer is fully protected by requiring that the government file a sworn complaint, stating the essential facts which make out the offense. Here, the complaint amply met this requirement since, on the basis of full investigation and repeated review, it alleged the exact tax which had been evaded. To demand more would neither protect the taxpayer's rights of privacy nor any other significant interest. It would merely impose an unnecessary burden without any compensating gain.

B. IN ANY EVENT, THE COMPLAINT HERE SATISFIED THE STANDARD OF PROBABLE CAUSE OF THE FOURTH AMENDMENT

Even if we assume, *arguendo*, that the standard of the Fourth Amendment is applicable, the complaint in this case was sufficient to make out probable cause.

This Court has often enunciated the legal standards for determining the existence of probable cause under

the Fourth Amendment. This basic standard is whether "the facts and circumstances within [the police officer's or Commissioner's] knowledge * * * were sufficient in themselves to warrant a man of reasonable caution in the belief" that the suspect has committed a crime. *E.g., Carroll* v. *United States,* 267 U.S. 132, 162; *Brinegar* v. *United States,* 338 U.S. 160, 175–176. Technical proof of guilt is not required, for the test deals with probabilities and with the practical considerations of everyday life which prompt reasonable men to action. *Id.* at 175. The quantum of information that constitutes probable cause must ultimately be measured by the facts and circumstances of the particular case. *Wong Sun* v. *United States,* 371 U.S. 471, 479; *Carroll* v. *United States,* 267 U.S. 132, 162.

Several recent decisions of this Court have shed considerable light on the application of these general principles to complaints which sought the issuance of arrest or search warrants. In *Giordenello* v. *United States,* 357 U.S. 480, 484, a narcotics case, the Court held that a complaint was defective where "it in effect recited no more than the elements of the crime charged * * *."[7] The Court stated the core of its decision as follows (*id.* at 486):

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[7] The complaint in *Giordenello* read in part (357 U.S. at 481):

> The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit:

The protection afforded by [Rules 3 and 4 of the Federal Rules of Criminal Procedure], when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint "* * * be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made.

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heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

And the complainant further states that he believes that ---------- ---------- are material witnesses in relation to this charge.

In *Giordenello,* the Court found it unnecessary to decide whether a warrant might be issued solely on the basis of hearsay information contained in the complaint. 357 U.S. at 485. The following year, in *Draper* v. *United States,* 358 U.S. 307, the Court held that a warrantless arrest could be made on the basis of hearsay testimony, obtained from an informant whose reliability had been previously determined, although it was corroborated only by the officer's personal observation that the subject resembled the description given him by the informant. Thereafter, in *Jones* v. *United States,* 362 U.S. 257, 269, the Court held that it followed, *a fortiori,* from *Draper* that a search warrant may be issued upon a showing of probable cause based on hearsay so long as there was "a substantial basis for crediting the hearsay." The Court reasoned that the rule cannot be more strict for arrests made with a warrant than without one since otherwise resort to the use of warrants would be discouraged. "In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded." *Id.* at 270–271. The Court upheld the search even though the "Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude

that narcotics were probably present in the apartment, and that is sufficient." *Id.* at 271. See also *Rugendorf* v. *United States,* 376 U.S. 528, 533 (complaint disclosed "substantial basis" for the Commissioner's issuance of a search warrant).

Subsequently, in *Aguilar* v. *Texas,* 378 U.S. 108, 110–111, this Court upheld a search warrant on the ground that the standard for testing the validity of a search warrant is less strict than for considering a search incident to an arrest:

> An evaluation of the constitutionality of a search warrant should begin with the rule that "the informed and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action of officers * * * who may happen to make arrests." *United States* v. *Lefkowitz,* 285 U.S. 452, 464. * * * Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant" * * * and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present * * *."[8]

The decisions in *Giordenello, Jones, Rugendorf,* and *Aguilar* make clear then that, whether a complaint

[8] The warrant was held invalid because the only allegation in the complaint was that "[a]ffiants have received reliable information from a credible person and do believe that" the suspect was secreting narcotics in his apartment.

is based on personal knowledge or reliable hearsay, it need only set forth a substantial basis upon which a finding of probable cause can be made. It is not appropriate for a reviewing court, after the warrant has been issued, to determine whether an unfavorable interpretation of the complaint is available; it is sufficient, as held in *Jones,* if the language of the complaint reasonably supports the finding of probable cause which the Commissioner made. Accord: *Irby* v. *United States,* 314 F. 2d 251, 253 (C.A. D.C.), certiorari denied, 374 U.S. 842; *United States* v. *Nicholson,* 303 F. 2d 330, 332 (C.A. 6), certiorari denied, 371 U.S. 823; *United States* v. *Ramirez,* 279 F. 2d 712, 716 (C.A. 2).

The complaint here set forth substantial basis for the finding of probable cause. The affiant, a special agent of the Internal Revenue Service, swore that he had personal knowledge that petitioner had evaded specific amounts of income and taxes and that he had obtained this information from public and private records and from other persons. Moreover, these conclusions, under the Service's usual procedures, had been reviewed at several levels by the Service and by the Tax Division of the Department of Justice, which made the ultimate decision to file the complaint.

Several courts have considered the validity of a complaint with allegations similar to those in the complaint here[9] on the assumption that Fourth Amendment standards were applicable. With the isolated exception of *United States* v. *Greenberg,* 320 F. 2d

[9] As discussed below (pp. 29–31), complaints in income tax cases follow a form provided by the Service.

467 (C.A. 9), every court which has considered the matter, including each of the courts below, has upheld the complaint. *Sanseverino* v. *United States,* 321 F. 2d 714, 715 (C.A. 10); *United States* v. *Black,* 216 F. Supp. 645 (W.D. Mo.); *United States* v. *Scheetz,* 224 F. Supp. 789 (S.D. Ind.).

Petitioner argues (Br. 14) that the complaint is defective because the allegation of a fraudulent understatement of income is based not on "personal knowledge," but on testimonial and documentary hearsay derived from third parties and said to lack the specificity which would entitle it to credit. However, part of the information sworn to by the agent comes from public and private records (R. 1) and has greater claim to reliability than information supplied, for example, by a narcotics informant. *Smith* v. *United States,* 321 F. 2d 427, 430 (C.A. 9). Moreover, as noted above, the specific figures regarding taxpayer's correct income and tax show that the agent obtained specific information. These considerations are sufficient to establish substantial basis for crediting the agent's information and finding probable cause.

Petitioner's argument is particularly unsound in a net worth case. In most criminal cases—for example, a crime of violence or a sale of narcotics—there is an act which is palpably criminal. Consequently, the complaint may be based on the say-so of eyewitnesses, either directly or through reliable hearsay. However, "in a crime such as tax evasion there is no tangible injury which can be isolated as a *corpus delicti*" (*Smith* v. *United States,* 348 U.S. 147, 154); the financial affairs involved in tax evasion cases are

not themselves ordinarily criminal; it is the concealment of the results of profitable ventures, not necessarily or ordinarily illegal *per se*, which gives rise to the crime.

Where the taxpayer attempts to conceal or cover up the sources of his income, the government, as in this case (R. 42), seeks to establish the fraudulent tax deficiencies by the net worth method of proof. The nature of a net worth case was succinctly described by the Court in *Holland* v. *United States, supra*, 348 U.S. at 125:

> In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an "opening net worth" or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's non-deductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of "conduct, the likely effect of which would be to mislead or to conceal." *Spies* v. *United States*, 317 U.S. 492, 499.

In light of the nature of a net worth prosecution, it is clear that the kind of investigation described in the present complaint provides a practicable and ample basis for an ultimate conclusion of fraudulent understatement of income. Obviously, as stated in the complaint (R. 1), the special agent must first examine the items of income reported in the taxpayer's return [10] and compare them with the income reflected in the taxpayer's "private" books and records [11] in order to determine whether a tax deficiency exists. If the books and records are unavailable for examination, are shown to be inaccurate, or, even if reconcilable with the returns, are nevertheless suspect for other reasons, the special agent then commences a full net worth investigation to establish the taxpayer's assets, liabilities, and non-deductible personal expenditures for the years involved. Necessarily, such an investigation requires the special agent to examine the records of third parties (such as banks, stock brokers, etc.),[12] and to interview third parties "with whom the said taxpayer did business" or who had "knowledge of said taxpayer's financial con-

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[10] Tax returns are specifically made public records under Section 6103 of the 1954 Internal Revenue Code and hence are excepted from the hearsay rule. In addition, matters revealed in a tax return fall within the "admissions" exception to the hearsay rule (28 U.S.C. 1732(a)).

[11] Information contained in a taxpayer's books (such as the partnership records examined by the special agent in this case (R. 21)) are excepted from the hearsay rule as either "admissions" or under the exception for business records (28 U.S.C. 1732(a)).

[12] Such records are also admissible as exceptions to the hearsay rule under 28 U.S.C. 1732(a). See note 11 above.

dition"[13] (see R. 1). It is also essential to an accurate net worth statement that the special agent examine various "public records * * * reflecting the said taxpayer's income" (see R. 1) as, for example, records showing land holdings in the county registry of deeds, motor vehicle registrations, and the like."[14]

It is only after a thorough investigation of this nature that the special agent gains the "personal knowledge" of the offense to which he swears in the complaint (R. 1). The individual pieces may be without crucial significance but the whole forms "a picture meaningful to a trained, experienced observer." *Christensen* v. *United States*, 259 F. 2d 192, 193 (C.A. D.C.). See also *Steele* v. *United States, No. 1*, 267 U.S. 498, 504–505. Upon the basis of the facts gained in such an investigation, the special agent can then apply his accounting expertise and his knowledge of the revenue laws in making his final allegations that the taxpayer filed a fraudulent return, stating with particularity his estimate of the amount of taxable income and the amount of tax evaded by the taxpayer (R. 1–2). In short, because of the unique nature of the crime of tax evasion, no more should be required in a complaint sworn to by a special agent than a statement of the basic findings drawn from his investigation of various sources, including information gained and reported from third parties.

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[13] Information acquired by interviewing third parties is admittedly hearsay.

[14] Federal and State records, if properly authenticated, are excepted from the hearsay rule. 28 U.S.C. 1733(a), (b); 28 U.S.C. 1738, 1739.

Petitioner also claims (Br. 15–20) that the present complaint fails to meet the requirements of the Fourth Amendment since it is merely a "form" complaint which the government uses throughout the country in order to toll the statute of limitations in tax evasion cases. It is true, as petitioner states, that a form of complaint is disseminated by the Department of Justice to serve as a guide to United States Attorneys, who frequently counsel the special agent in the mechanics of preparing and filing the complaint.[15] Petitioner fails to note, however, that the investigative steps enumerated in the complaint are bracketed on the following express instructions (see the Appendix, p. 33 below):

> The bracketed descriptions of the kinds of investigation conducted by the subscribing Agent may all be used if they correctly reflect the facts. Otherwise, the inapposite description should, of course, be deleted. When appropriate, the description of a different investigative course should be added or substituted based on the facts.

It is clear from the complaint itself that the special agent in the case did not slavishly copy the form; he deleted one of the bracketed phrases. Cf. R. 1 with

[15] The suggested form of complaint used by the Government, which is set forth in the Appendix, pp. 32–33 below, was drawn up by the Department of Justice in order to meet the requirements of the *Giordenello* decision. Cf. *United States* v. *Langsdale*, 115 F. Supp. 489 (W.D. Mo.) (pre-*Giordenello*), and *United States* v. *DeHardit*, 120 F. Supp. 110 (E.D. Va.), affirmed, 224 F. 2d 673 (C.A. 4), certiorari denied, 350 U.S. 863 (pre-*Giordenello*); with *United States* v. *Freeman*, 165 F. Supp. 121 (S.D. Ind.) (post-*Giordenello*).

the Appendix, p. 32 below. Moreover, the record confirms the fact that the agent made a lengthy investigation before expressing his conclusions in the complaint (see p. 6, note 2 above).[16]

Petitioner suggests (Br. 18) that the purpose of the complaint procedure—to supply the Commissioner with sufficient facts upon which to make a determination of probable cause—is somehow defeated by "a form which is so universal in its application that it is literally true even when viewed in the light of the myriad probabilities of tax evasion." However, as already observed, the offense of tax evasion, unlike the offenses charged in the typical criminal case is subject to a regularized pattern of investigation; standard techniques are normally utilized when the government seeks to establish tax deficiencies by the net worth method of proof. See, *e.g.*, *Holland* v. *United States*, *supra*; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160.[17] In such circumstances, the government's use

[16] Petitioner's allegation (Br. 19) that the testimony of the special agent in the district court indicated "that he did not even understand let alone prepare the affidavit" has no support in the record. The record reference cited by petitioner (R. 20) wholly fails to support [illegible] claim, and the agent's comprehension of the subject matter was clear from his testimony.

[17] Similar patterns of investigation, frequently no less complex, are also applicable where the government seeks to establish a fraudulent understatement of income under the "specific items" or "bank deposits" theory of proof. See, *e.g.*, *Swallow* v. *United States*, 307 F. 2d 81 (C.A. 10), certiorari denied, 371 U.S. 950; *United States* v. *Durant*, 324 F. 2d 859 (C.A. 7), certiorari denied, 377 U.S. 906; *Gleckman* v. *United States*, 80 F. 2d 394 (C.A. 8), certiorari denied, 297 U.S. 709.

of a form is perfectly appropriate as a guide to Internal Revenue Agents.

Indeed, the use of a form is, for present purposes, irrelevant. If the sworn allegations meet the test of probable cause, the complaint is valid whether or not it is based on a suggested form. As we have seen above, the complaint here satisfies the standard of the Fourth Amendment and, *a fortiori,* the less demanding standard which we believe is properly applicable.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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JANUARY 1965.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE ---------- DISTRICT OF ----------

UNITED STATES OF AMERICA
against

Complaint

Complaint for Violation of Section 7201 Internal Revenue Code of 1954*

Before ---------, United States Commissioner ------, ----------.

The undersigned complainant, being duly sworn, states:

That he is a Special Agent [or Revenue Agent] of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of ---------- for the calendar year 19--, by examining the said taxpayer's tax return for the year 19-- and other years; [by examination and audit of the said taxpayer's business and financial books and records;] [by identifying and interviewing third parties with whom the said taxpayer did business;] [by consulting public and private records reflecting the said taxpayer's income;] [and by interviewing third persons having knowledge of the said taxpayer's financial condition].

That based on the aforesaid investigation, the complainant has personal knowledge that on or about the ------ day of ---------, 19--, at ---------, ---------, in the ---------- District of ---------, did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United

States of America for the calendar year 19--, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of ----------, at ---------- a false and fraudulent income tax return, wherein he stated that his taxable [or adjusted gross] income for the calendar year 19-- was $----------, and that the amount of tax due and owing thereon was the sum of $----------, when in fact his taxable [or adjusted gross] income for the said calendar year was the sum of $---------- upon which said taxable [or adjusted gross] income he owed to the United States of America an income tax of $----------.

Title of Subscribing Internal Revenue Service Officer

Sworn to before me and subscribed in my presence, this ---------- day of ----------; 19--.

United States Commissioner

---

*The bracketed descriptions of the kinds of investigation conducted by the subscribing Agent may all be used if they correctly reflect the facts. Otherwise, the inapposite description should, of course, be deleted. When appropriate, the description of a different investigative course should be added or substituted based on the facts.

When drafting complaints for violation of other Sections of the Internal Revenue Code, refer to the appropriate indictment form as a guide.

[Complaint for tolling statute of limitations under provisions of Section 6531, Internal Revenue Code of 1954. To be sworn to by Internal Revenue Service Officer having knowledge of facts].

Form No. 1

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 347.

MAX JABEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

STATEMENT.

The Government's brief makes two arguments, (1) that a complaint under 26 U. S. C., § 6531, need not aver probable cause, and (2) that in any event, the complaint herein demonstrated probable cause. Our initial brief dealt with the second contention only, since heretofore there had been no question that a complaint under 26 U. S. C., § 6531, was required to show probable cause, **Greenberg v. United States**, 320 F. 2d 467 (9th Cir. 1963); **Jaben v. United States**, 333 F. 2d 535 (8th Cir. 1964); **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963); **United States v. Black**, 216 F. Supp. 645 (W. D. Mo. 1963); **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963). Thus, this brief is devoted only to answering contention (1) of the Government's brief made for the first time in this Court.

ARGUMENT.

A Complaint Which Merely States the Essential Facts Constituting the Offense and Which Does Not Show Probable Cause, Does Not Satisfy Section 6531.

68A Stat. 815, Title 26, U. S. C., § 6531, provides that a complaint timely filed with the Commissioner extends the statute of limitations for a period of nine months. The complaint referred to obviously is the one defined by Rules 3 and 4 of the Federal Rules of Criminal Procedure:

Rule 3. The Complaint

"The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4. Warrant or Summons Upon Complaint

(a) **Issuance.** If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the Government, a summons instead of a warrant shall issue. . . ."

Reading Rules 3 and 4 together, the "probable cause" mentioned in Rule 4 clearly must be read into Rule 3 as a requirement for a complaint. This is the holding of **Giordenello v. United States**, 357 U. S. 480, 78 S. Ct. 1245, 92 L. Ed. 436 (1958). Also, the cases decided under § 6531 unanimously hold that the complaint must show probable cause, and satisfy the requirements of **Giordenello. Greenberg v. United States**, 320 F. 2d 467 (9th Cir. 1963); **Sanseverino v. United States**, 321 F. 2d 714 (10th Cir. 1963); **United States v. Black**, 216 F. Supp. 645 (W. D.

Mo. 1963); **United States v. Scheetz**, 224 F. Supp. 789 (S. D. Ind. 1963). This was also the holding of the Eighth Circuit in this case (R. 61). In addition, this has heretofore been the position of the Justice Department as evidenced by its brief below in this case, and by the fact that the form complaint used herein by it to toll the statute of limitations "was drawn up by the Justice Department to meet the requirements of the **Giordenello** decision" (Gov. Br. 29 fn 15).

It is submitted that Congress intended that the complaint show probable cause in order that the statute be tolled; and that Congress in requiring a complaint meant a valid complaint, and not merely "a complaint" (Gov. Br. 13).

As the Government suggests at page 15 of its brief, the purposes of allowing 9 additional months to present a tax case to the grand jury was that a grand jury may not be in session; time may be needed to investigate such matters as the taxpayer's explanation; or the taxpayer may desire an opportunity to confer with the Justice Department or the United States Attorney. The Government does not suggest, nor would it be justified in suggesting, that the purpose of the additional nine months was to give it more time to investigate to make its case. If Congress thought six years was not enough time to investigate, the obvious solution would have been to increase the statute beyond six years and this it did not do. Thus, in determining what was the Congressional intent, we must keep in mind the limited purpose of the nine month extension, which was to give the defense time to confer with the Government, to give the Government time to investigate defense claims, and to give time to convene a grand jury. Since, the purpose of the additional 9 months is not to give the Government time to investigate further, it seems altogether reasonable that Congress would require a showing of "probable cause" within the limitation period, since

normally within the six years, the Government would have to make a showing sufficient for a grand jury to find "probable cause". Congress must have been concerned that extension of the statute of limitations by the Government could do violence to the spirit of the statute of limitations. But, by requiring a showing of probable cause to a Commissioner within the six years, Congress has preserved the spirit of the statute of limitations, since the taxpayer is protected as much by the finding of "probable cause" by a "neutral and detached magistrate" as he is by a finding of "probable cause" by a grand jury. At the same time, the purpose of finding time to convene a grand jury, finding time for the Government to investigate defense explanations, and finding time for the Government and defense to confer, is satisfied. Thus the requirement that a showing of probable cause be made within the six years preserves and protects the spirit of the statute of limitations while serving the limited purpose for which the nine months additional time is necessary.

Moreover, by requiring the Government to make a showing of "probable cause", the statute of limitations is not tolled merely on suspicion or "merely at the whim of the Government". (Gov. Br. 10). Congress must have intended in requiring that the complaint be filed before a Commissioner that the Commissioner act other than as a "rubber stamp" for the Government. But, what function can the Commissioner serve if the complaint contains only a statement of the essential elements constituting the offense? How could he tell from such a complaint that there is justification for tolling the statute of limitations? How could he tell that the statute was not being tolled "merely at the whim of the Government"? The answers to these questions are that unless there is a showing of "probable cause" required, the Commissioner merely acts as a "rubber stamp" and for all we know, then, the statute is being

tolled "merely at the whim" of the Government. It is respectfully submitted that Congress intended:

> ". . . that the inferences from the facts which lead to the complaint * * * be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required . . . [to toll the statute of limitations] . . . exists," **Giordenello v. United States**, 357 U. S. 480, 486, 78 S. Ct. 1245, 1250, 92 L. Ed. 436 (1958).[1]

In addition, Congress could have adopted other means to toll the statute of limitations. Instead, it chose to allow an extension of time only on filing of a complaint. Surely Congress was aware that "probable cause" was intimately associated with complaints. An arrest warrant or summons in lieu of arrest issued on complaint can only be issued on probable cause. **Rules 3 and 4, Federal Rules of Criminal Procedure.** When a person is arrested without a warrant, he must be taken speedily before a Commissioner, a complaint must be filed, and the prisoner must be released unless there is evidence justifying a finding of "probable cause." **Rule 5, Federal Rules of Criminal Procedure.** Thus, in all instances where a complaint is used, there must be a showing of "probable cause" and Congress must have been aware of this. Surely, then, Congress in choosing a complaint as the device for tolling the statute of limitations contemplated that a showing

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[1] The detailed activity in the Justice Department before it authorizes prosecution is entirely beside the point. Whatever the motives of the Justice Department, it does not serve a "neutral and detached function" in connection with a tax investigation. Besides, if the Commissioner is to rely only on the conclusion of the Justice Department, his role is reduced to that of "rubber stamp".

Also, the Justice Department's review procedure has its shortcomings. Taxpayers are not always given the opportunity to explain. In fact, petitioner Jaben in this case was never accorded a conference although he repeatedly requested one.

must be made to the Commissioner before the statute of limitations is tolled.[2]

Furthermore, the complaint herein has a second purpose besides tolling the statute of limitations for it served as a basis for issuing a summons. It has been held that the same probable cause required for the issuance of an arrest warrant is required for the issuance of a summons. **Greenberg v. United States**, 320 F. 2d 467, 471 (9th Cir. 1963). This is only reasonable because like an arrest warrant, the summons gives jurisdiction over the person, and only as a matter of convenience is a summons issued rather than a warrant. Further, an arrest warrant is issued if the defendant does not respond to the summons. Thus, the complaint herein served the function of bringing about the summons of the petitioner. It is absurd to contend that Congress intended that two different complaints be issued, one to arrest or summon the defendant and another to toll the statute, with only the latter requiring a showing of probable cause. This obviously is not the practice of the Department of Justice. Certainly Congress intended only one complaint, and this complaint had to allege probable cause.

In short, we believe Congress required the Government to show probable cause in order to preserve and protect

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[2] The Government cites the case of *Byrnes v. United States*, 327 F. 2d 825 (9th Cir. 1964), which holds that a Rule 5 complaint (as opposed to one under Rules 3 and 4) need not aver probable cause. Under Rule 5, the defendant is to be taken before a Commissioner "without unnecessary delay" and the Commissioner is required to hear evidence and determine whether "probable cause" exists from the evidence. Had petitioner been taken before a Commissioner "without unnecessary delay", had evidence been adduced, and had probable cause been shown, obviously petitioner could not be prejudiced. But there was no hearing held. And the Government never did show "probable cause" to the Commissioner. Under Rule 5, even if the complaint need not show probable cause it is nevertheless invalid if the Government cannot prove probable cause. Here the Government did not prove probable cause and for that reason the complaint would be invalid, if Rule 5 rather than Rules 3 and 4 applied.

the spirit of the statute of limitations, by preventing the statute of limitations from being tolled "merely at the whim" of the Government. Further, Congress in choosing a complaint as the device for tolling the statute of limitations knew that the term "complaint" had an established meaning, and that "probable cause" was a necessary element to validate any complaint. Congress had no reason to require less because the only interest to be served was to allow more time to convene a grand jury, to investigate defense explanations, or to confer with the Government, and this interest is not impaired by requiring the Government to show probable cause.

CONCLUSION.

For the reasons stated herein and in our initial brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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